

OPINIONS
OF THE CORPORATION COUNSEL
AND ASSISTANTS

January 1, 1938 to January 1, 1940

and

CUMULATIVE INDEX

to

OPINION VOLUMES I to XX

1872 to 1940



CHAMPLIN-SHEALY COMPANY
PRINTERS



365

OPINIONS

OF THE

CORPORATION COUNSEL
and ASSISTANTS

JANUARY 1, 1938 to JANUARY 1, 1940

AND

CUMULATIVE INDEX

FOR

1872 to 1940
OPINION VOLUMES I to XX

Edited and Compiled by
BARNET HODES
CORPORATION COUNSEL



CITY OF CHICAGO
DEPARTMENT OF LAW

VOLUME XX

PUBLISHED BY
AUTHORITY OF THE CITY COUNCIL

1940

PREFACE

Containing a cumulative index that covers an opinion product of 68 years (1872-1940), this twentieth volume of the *Opinions of the Corporation Counsel and Assistants* of the City of Chicago carries forward in an important way a program which was begun five years ago. That program was a conscious effort to produce the opinions of the Chicago Department of Law in such form that they would have an enhanced utility in the current work of the department, and also to administrators and students of city government generally.

Publication of collections of its opinions in printed volumes was first begun by the Chicago law department in 1897, the opinions in that volume dating back to the period of the Chicago fire of 1871. The procedure followed in compiling the first volume was to select opinions arbitrarily deemed worthy of preservation and to publish them according to date. No effort was made to organize the opinions according to subject matter. Many opinions, which may have been more valuable than those included, were omitted. This same procedure was followed in all subsequent volumes until 1935.

In conjunction with the reorganization of the Chicago law department in 1935, when six separate law offices of the city were consolidated into a single coordinated unit and new administrative techniques in general were established, a new concept as to the presentation of the opinion product of the department was followed. The result was Volume XVIII, published in October, 1936, in which for the first time the opinions were collated according to subject matter. Also, for the first time, *all* opinions were included or recorded in some fashion—by being printed in full, by digest, or by reference. The result was something much more than a mere historical reference work: a volume which represented a practical and integrated text book on actual legal problems faced by a dynamic city. This same style was followed in the preparation of Volume XIX published in 1938, and it is continued in the presentation of the opinions in this volume.

What the subject-matter arrangement does for enhancing the

utility of each volume published since 1935, the comprehensive cumulative index in this volume does for all twenty volumes published since 1897. The cumulative index, in effect, organizes all of the published opinions according to related subjects. It is therefore now possible to discover easily all the official writings by the Chicago law department on any particular matter from 1872 to the present day.

More has been done to compile this cumulative index than merely to shuffle together the index entries in each of the individual volumes and in the index volume that was published in 1926. Numerous new subject classifications and references were developed, for the temptation simply to lift former index entries was avoided. The index is generous with cross references, as the principle followed in its preparation was that the searcher should be able to find the desired material readily. Also, an effort was made to cause this index to be modern in phraseology, even though many of the opinions included have to do with problems of an earlier generation. Thus, for example, matters relating to "hack stands" will be found indexed with "taxicabs," although to be sure there will also be a reference to "hack stands."

An index is not recommended, of course, for recreational reading, yet persons of an inquisitive turn of mind undoubtedly will derive both profit and some pleasure from simply thumbing through this index. In the more than 20,000 entries recorded here will be found reflections of Chicago's growth from a small village to one of the great cities in the world and in a manner just as revealing as any historical treatise could be. Moreover, the student will find it possible to use this index as a sort of social chronometer and determine when particular problems troubled the city. Thus, a glance at the index indicates that relief was granted only to the sick until 1933, when unemployment broadened the city's responsibility. To take another example, housing did not become a matter of much municipal concern until 1934.

The Research Division of the Department of Law, directed by Harry Barnard, prepared this volume as it has handled the preparation of the other opinion volumes since 1935. Especially do I wish to acknowledge the skillful and intelligent work of Esther Oswianza Kegan, member of the Research Division, who was directly in charge of this project and saw it through its many complicated steps. Appreciation is also due to Herbert M. Abrams,

Assistant Corporation Counsel, for his fine cooperation. The Federal Works Project Administration gave valuable assistance in certain technical phases, such as typing and proofreading, and the thanks of the city are due this agency and its workers.

BARNET HODES,
Corporation Counsel.

November, 1940.

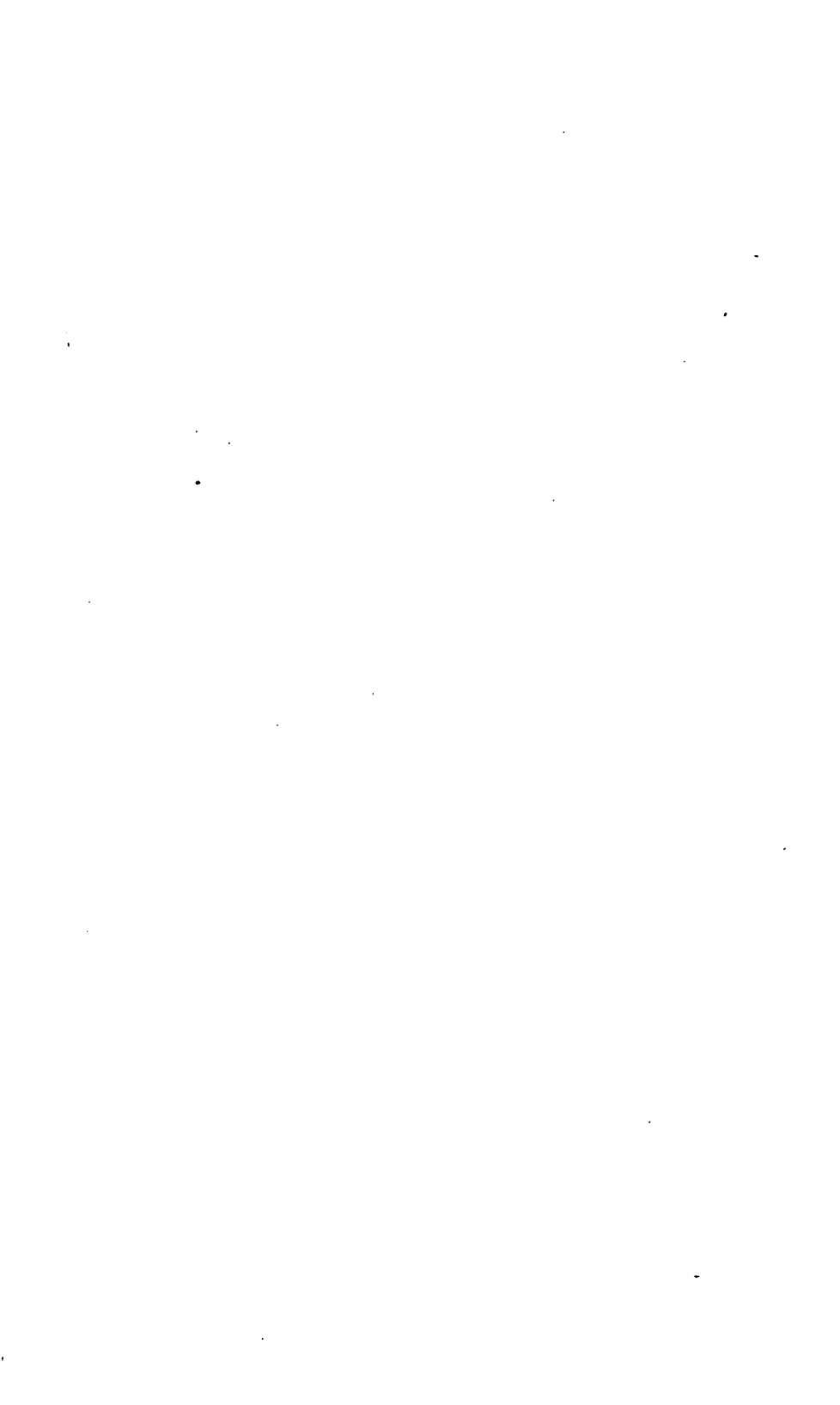


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AUTHORS OF THE OPINIONS

Authors of the opinions recorded in this volume are indicated by their initials. The following is a list of the initials and the corresponding full names arranged in the alphabetical order of the initials.

A. A. P.....	A. A. Pantelis
A. A. S.....	Arthur A. Sullivan
A. C.	Alphonse Cerza
A. F. G.....	Al F. Gorman
A. J. R.....	Alexander J. Resa
B. H.	Barnet Hodes
C. B. C.....	Charles B. Collins
C. H. L.....	Carl H. Lundquist
C. N.	Casper Nathan
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E. J. B.....	Emil J. Broz
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R. N.	Ruth Nelson
T. A. M.....	Thomas A. Murphy
W. J. L.....	William J. Lancaster
W. V. S.....	Walter V. Schaefer

EXPLANATORY NOTES AND DATA

KEY TO CITATION ABBREVIATIONS

The City Code has been cited as in the following examples:

Code '11: 1541	refers to section 1541 of the <i>Chicago Code of 1911</i> .
Code '22: 2063, 2064	refers to sections 2063 and 2064 of the <i>Chicago Municipal Code of 1922</i> .
Code '31: 4194	refers to section 4194 of the <i>Revised Chicago Code of 1931</i> .
Mun. Code: 25-8	refers to chapter 25, section 8 of the <i>Municipal Code of Chicago</i> , adopted on August 30, 1939 and subsequently amended.

The revised Illinois statutes have been cited as in the following examples:

IRS '39, 98: 18	refers to chapter 98, section 18 of the Illinois State Bar Association's <i>Illinois Revised Statutes of 1939</i> .
ISBS '37, 24½: 12	refers to chapter 24½, section 12, of the Illinois State Bar Association's <i>Illinois Revised Statutes of 1937</i> .

Opinions of the Corporation Counsel of Chicago and Assistants have been cited as in the following examples:

Op. Corp. Coun. (1920-23) p. 42.	refers to <i>Opinions of the Corporation Counsel of Chicago and Assistants</i> rendered from January 1920 to April 1923 inclusive, page 42.
19 Op. Corp. Coun. 409 (No. 9245).	refers to <i>Opinions of the Corporation Counsel of Chicago and Assistants</i> volume 19, page 409, opinion number 9245.

* * * * *

ALR	<i>American Law Reports</i>
Coun. J.	<i>Journal of the Proceedings of the City Council of Chicago</i>
CJ	<i>Corpus Juris</i>
Ill. Laws	<i>Laws of the State of Illinois</i>
Ill. Stat. (Jones Ann.)	<i>Jones Illinois Statutes Annotated</i>
Ill. Stat. Ann. (Smith-Hurd)	<i>Smith-Hurd Illinois Annotated Statutes</i>
Op. Ill. Atty. Gen.	<i>Opinions of the Attorney General of Illinois</i>
Op. Atty. Gen. of US	<i>Opinion of the Attorney General of the United States</i>
RCL	<i>Ruling Case Law</i>
USCA	<i>United States Code Annotated</i>
USHA	<i>United States Housing Authority</i>
US Stat.	<i>United States Statutes at Large</i>

DATA GIVEN WITH REPORTED OPINIONS

Above each opinion reported in this volume there is printed in italics the number of the opinion, the office or officer to whom the opinion was written, the initials of the person who prepared the opinion, the date of the opinion, and the length of the opinion in standard typewritten pages.

When the office or officer to whom the opinion was written is not indicated, the opinion was addressed to a person having public business with the City who was not a municipal official.

NUMBERING OF OPINIONS

The numbering of the opinions is a continuation of the chronological sequence of volume 19 of the *Opinions of the Corporation Counsel and Assistants*, but the arrangement of the opinions is according to their subject matter.

For reference convenience, a table of the opinion numbers with corresponding page numbers is given in this volume at page 310.

REFERENCES TO OPINIONS NOT INCLUDED, BUT NOTED

An annotation to an opinion digest which states, as in the case of Opinion No. 10078, p. 47, "Opinion No. 10078 * * * holds substantially the same as the above opinion" indicates that Opinion No. 10078 has not been included in the volume because it is substantially the same as the opinion that is recorded, and is noted solely for the sake of completeness.

This information is given for its value to the City officials and employees, so that the Department of Law will have a permanent record of all opinions rendered.

CUMULATIVE INDEX

Citations in the Cumulative Index are to volume and page numbers. In addition, references to volumes 18, 19 and 20 include opinion numbers.

The early volumes are sometimes referred to by date. To assure uniformity in citations, all volume citations have been changed to volume numbers in accordance with the following table:

TABLE OF VOLUME NUMBERS

<i>Volume</i>		<i>Years</i>
1	 Edited by Corporation Counsel William G. Beale	1872 to 1897
2	 Edited by Corporation Counsel Edgar B. Tolman	1897 to 1905
3	 Edited by Corporation Counsel Francis X. Busch	1905 to 1907
4	 Edited by Corporation Counsel Edward J. Brundage	1907 to 1908
5	 Edited by Corporation Counsel Edward J. Brundage	1909 to 1911
6	 Edited by Corporation Counsel William H. Sexton	1911 to 1912
7	 Edited by Corporation Counsel William H. Sexton	1913 to 1914
8	 Edited by Corporation Counsel John W. Beckwith	1914 to 1915
9	 Edited by Corporation Counsel Samuel A. Ettelson	1915 to 1916
10	 Edited by Corporation Counsel Samuel A. Ettelson	1916 to 1919
11	 Edited by Corporation Counsel Samuel A. Ettelson	1920 to 1923
12	 Edited by Corporation Counsel Francis X. Busch	1923 to 1924
13	 Edited by Corporation Counsel Francis X. Busch	1924 to 1925
14	 Edited by Corporation Counsel Francis X. Busch	1925 to 1926
15	 Edited by Corporation Counsel Samuel A. Ettelson	1926 to 1927
16	 Edited by Corporation Counsel Samuel A. Ettelson	1927 to 1928
17	 Edited by Corporation Counsel Samuel A. Ettelson	1928 to 1929
18	 Edited by Corporation Counsel Barnet Hodes	1929 to 1935
19	 Edited by Corporation Counsel Barnet Hodes	1936 to 1937
20	 Edited by Corporation Counsel Barnet Hodes	1938 to 1940

SECTION I
MUNICIPAL ORGANIZATION AND
INTERGOVERNMENTAL RELATIONS

CHAPTER I

POWERS AND DUTIES OF THE CITY COUNCIL AND THE CITY'S DEPARTMENTS AND OFFICES

A. THE CITY COUNCIL

POWER OF CITY COUNCIL IN ALDERMANIC CONTESTS

(No. 10006—Committee on Judiciary and State Legislation—F. V. M.—
May 16, 1939—6 pp.)

The City Council has jurisdiction over aldermanic election contests and has the authority to prescribe the rules and regulations pertaining to the hearing of said contests.

Citations:

Statutes: Ill. Stat. (Jones Ann.), v. 3, ch. 21, pp. 43, 44.

Cases: Linegar v. Rittenhouse, 94 Ill. 208 (1879).

Nesladek v. Kanka, 341 Ill. 181 (1930).

City of Evanston v. Carroll, 92 Ill. App. 495 (1900).

Other reference: Op. Corp. Coun. (1920-23), p. 42.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of a letter from committee secretary, in which he requests us to advise you as to the provisions of the law concerning aldermanic contests including the powers of the City Council in the premises.

We quote from

AN ACT to provide for the incorporation of cities and villages, approved April 10, 1872, in force July 1, 1872.

"Article III, Section 6. The City Council shall be judge of the election and qualification of its own members."

Jones *Illinois Statutes Annotated*, Vol. 3, ch. 21, p. 43.

In the case of *Linegar v. Rittenhouse*, 94 Ill. 208, 211, 213, the court said:

"An election was held in the city of Cairo, on the 15th day of April, 1879, for aldermen and other city officers. The parties to this controversy were opposing candidates for alderman in the second ward of the city. When the votes were canvassed, on the 18th day of the month, by the city council, appellant was declared duly elected. The city was, at that time, organized under the general incorporation act governing cities, villages and towns.

"Appellee filed a petition in the county court to contest the election, and charged that Linegar did not receive a majority of the legal votes cast in the ward at the election, and that petitioner did receive a majority of the legal votes so cast for alderman in that ward; that there were a number of votes counted for Linegar which were not cast for him, and twenty votes were counted for him which were cast by persons not legally entitled to vote at that election in that ward; and that Linegar had not paid a portion of his taxes when he qualified as an alderman.

"Appellant demurred to the petition, on the ground that the county court had no jurisdiction to hear or determine the contest, but that it belonged to the city council, which has the sole jurisdiction of such contests.

"The court overruled the demurrer, and defendant thereupon answered. A trial was had, and the court found and decreed that Linegar did not receive the majority of all the legal votes cast at the election, and that petitioner did receive a majority of all legal votes cast in that ward at the election.

"Defendant thereupon appealed, and has assigned various errors on the record, the first of which is overruling his demurrer to appellee's petition. And this assignment of error raises the question of whether the county court had jurisdiction of the subject matter of this contest.

"In the view we take of the case, this is the only question we deem important to consider. * * *

"But reference is made to section 57 of the general incorporation law of cities, villages and towns (Rev. Stat. 117). That section provides that: 'The manner of conducting and voting at elections to be held under this act, and the contesting of the same, the keeping of poll lists and canvassing the same, shall be the same, as nearly as may be, as in the case of the election of county officers, under the general laws of this State.' Here we have the manner prescribed by the general law, section 113 of which provides that the person desiring to contest shall, within thirty days after the person is declared elected, file with the clerk of the proper court, a statement in writing setting forth the points on which he will contest the election, which statement shall be verified by affidavit, etc. The 114th section provides that a summons shall issue to the person whose office shall be contested, or he shall be notified to appear, and the 115th section requires the evidence to be taken in the same manner and on like notice as in cases in chancery, and the case shall be tried in like manner as cases in chancery. These sections point out the mode, and we can see no great inconvenience, by a few slight changes, in rendering it entirely practicable for the city council to try such a contest. The petition can be filed with the city clerk, the notice can be given to appear before the city council, and depositions taken and returned to the council under these sections, and a trial had by that body. The city council is certainly as well adapted to try such a contest as were these justices of the peace to determine such contests as to county officers under previous laws (see Rev. Stat. 1845, p. 222, sec. 42 *et seq.*). Hence we have a provision that the city council shall determine such cases, and the manner prescribed. * * *

"The county court not having jurisdiction to try the case, the judgment is reversed."

In the case of *Nesladek v. Kanka*, 341 Ill. 181, 185-187, Mr. Commissioner Partlow reported this opinion:

"* * * In *Bowen v. Russell*, 272 Ill. 313, a petition was filed in the county court to contest the election of a commissioner of the city of Elgin, which was under the commission form of government. The county court held that it had no jurisdiction and dismissed the petition, and the judgment was affirmed. On page 316 this court said: 'Beyond question, under the general Cities and Villages act for the incorporation of cities and villages, the city council of cities organized under the act had the sole authority to hear contests as to its members, and the village trustees of organized villages had the same authority as to members of the board of trustees,' citing cases. In *Lyons v. Becker*, 272 Ill. 333, a similar petition was filed in the circuit court to contest the election of city commissioners. The trial court held that it had no jurisdiction, and in affirming the judgment, on page 335 this court

said: 'It is conceded that under the old law (the general City and Village act) the city councils of cities organized thereunder had the sole authority to hear and determine election contests as to their members, and that the village trustees of organized villages had the same authority to hear and determine contests as to members of the board of trustees. This court has frequently so decided.' * * *

"The board of trustees of the village of Stickney had exclusive jurisdiction to determine the election and qualification of its members and the county court improperly assumed jurisdiction. Its judgments are reversed and the causes remanded, with directions to dismiss the petitions.

"PER CURIAM: The foregoing opinion reported by Mr. Commissioner Partlow is hereby adopted as the opinion of the court, and judgment is entered in accordance therewith."

We quote from an opinion of the Corporation Counsel dated March 15, 1920:

"* * * We have received your letter of the 11th inst., requesting us to render an opinion as to the jurisdiction of the City Council in the matter of two petitions referred to your committee by the City Council, viz.:

"(1) A petition contesting the election of Alderman John Lyle at the election held in the 32nd ward, February 24th. The petitioner contends that if the ballots are opened and recounted it will be shown that Alderman Lyle did not receive a majority of all the votes and that, consequently, a supplemental election would have to be held April 6th. * * *

"With reference to the petition contesting the election of Alderman John H. Lyle of the 32nd ward, we are of the opinion that the incoming City Council under Section 6 of Article III of the Cities and Villages act has jurisdiction in the matter. * * *

Op. Corp. Counsel (1920-23), p. 42.

With reference to the powers of the City Council in such election contests we again refer you to the Cities and Villages Act:

"Article III, Section 7. It shall determine its own rules of proceeding, punish its members for disorderly conduct, and with the concurrence of two-thirds of the aldermen elect, may expel a member, but not a second time for the same offense: *Provided*, that any alderman or councilman who shall have been convicted of bribery shall thereby be deemed to have vacated his office.

"Section 8. A majority of the aldermen elect shall constitute a quorum to do business, but a smaller number may adjourn from time to time, and may compel the attendance of absentees, under such penalties as may be prescribed by ordinance."

Jones Illinois Statutes Annotated, Vol. 3, ch. 21, pp. 43, 44.

In the case of *City of Evanston v. Carroll*, 92 Ill. App. 495, 502, the court, after quoting the foregoing sections of the Cities and Villages act, expressed the following:

"* * * From the above provisions of the statute, it is apparent that the city council of Evanston had jurisdiction of the contest and the power to determine its own rules of proceeding, * * *."

From the foregoing we are of the opinion that the City Council has jurisdiction over the election contests between John Haderlein and Edwin F. Meyer of the 45th Ward, and James B. Waller and Mathias Bauler of the 43rd Ward, and has the authority to prescribe the rules and regulations pertaining to the hearing of said contests.

USE OF ALDERMAN'S ALLOWANCE

(No. 10047—Alderman, 5th Ward—M. H. F.—July 11, 1939—2 pp.)

The appropriation for City Council members not to exceed \$47.00 is a reimbursement for the actual expense incurred in the operation of automobiles in connection with official duties. Aldermen have no right to use monies appropriated for automobile maintenance for the operation of their offices.

CLOSING CITY HALL ON LEGAL HOLIDAYS

(No. 10125—Commissioner of Public Works—R. N.—October 31, 1939—4 pp.)

The State statutes do not require that the City Hall be closed or that ordinary business be suspended on legal holidays. City ordinances do not require the closing of the City Hall at any time, but do exempt certain offices from remaining open on designated holidays. When the City Council directs that the City Hall be closed, such action shall be taken.

Citations:

Statutes: IRS '39, 98: 18, 19, 20, 46: 194, 122: 211.

Ordinance: Mun. Code: 25-8.

Cases: Bradley v. Claudon, 45 Ill. App. 326 (1892).

Richter v. The Chicago & Erie RR. Co., 273 Ill. 625 (1916).

OPINION OF FOREGOING SYNOPSIS

You submitted to the Law Department a memorandum in which you quoted certain sections of the Illinois Revised Statutes and the Municipal Code relative to holidays, and asked certain questions as to the interpretation thereof, particularly as affecting the closing of the City Hall on holidays and the necessity for amending the Municipal Code on the subject.

The sections of the Code and of the Statute quoted check with the provisions in regard to holidays insofar as said sections are quoted. The statutory provisions quoted from chapter 98, which is the Negotiable Instruments Act (sections 18 and 19), together with section 20 of said Act which is not quoted, are for the purpose of making certain the due date of bills and notes where the maturity date of the instrument itself falls on a legal holiday. The provisions are, as explained in the context of the sections, solely for that purpose. Our Appellate Court has held that the section quoted "under head of Negotiable Instruments only regulates the presentation and payment of such instruments on legal holidays. But it nowhere attempts to regulate the holding of court or other legal business on a legal holiday." (*Bradley v. Claudon*, 45 Ill. App. 326.)

Section 194 of chapter 46 (the Election Act) is for a similar purpose and is so stated in that section.

Section 211 of chapter 122 relates to schools and school teachers only.

It has also been held by our Supreme Court that "if a day be made a holiday for purposes stated in the statute creating it, it is not a legal holiday for any purpose not named in the statute." (*Richter v. The Chicago and Erie R. R. Company*, 273 Ill. 625.) Nowhere in the statute can be found any requirement that the City Hall be closed or for the

suspension of ordinary business on legal holidays. The City Council may, in its discretion, close the City Hall on legal holidays or such other days as it may deem proper.

Following are the answers to your specific questions:

1. May I inquire when are the legal holidays in Chicago?

Those established by Federal or State law. Our State law establishes the following as holidays:

The first day of January;
 The twelfth day of February;
 The twenty-second day of February;
 The thirtieth day of May;
 The fourth day of July;
 The first Monday in September;
 The twelfth day of October;
 The eleventh day of November;
 Any day appointed or recommended by the Governor of this State or by the President of the United States as a day of fast or thanksgiving;
 The twenty-fifth day of December;
 The days upon which general elections for members of the House of Representatives of this State are held.

2. What days should the City Hall be closed?

We find no code requirement as to closing of the City Hall. By section 25-8 of the Municipal Code of Chicago it is required that "The offices of the respective departments, bureaus or other agencies of the city government * * * shall be open * * * on every day except * * *" on such days as are there noted. Where by order the City Council directs that the City Hall shall be closed, such action shall be taken.

3. What are the two requisite requirements for the closing of the City Hall?

We are unable to determine just what you have in mind when you ask for the "two requisite requirements." Council action is a requirement.

4. Should the Municipal Code be amended on this subject?

From a reading of your memorandum we see no necessity for such action. However if it is deemed desirable to include within the terms of the Municipal Code of Chicago those holidays established by Federal or State law which are not included in section 25-8 of the code, this lies within the province of the City Council.

RACIAL DISCRIMINATION

(No. 9866—Alderman, 41st Ward—B. H.—July 29, 1938—8 pp.)

The City may not impose residential restrictions based solely upon differences in color or race.

Citations:

Constitution: United States, Fourteenth Amendment.

Cases: Ah Kow v. Nunan, 5 Sawyer's 563 (1879).

Buchanan v. Warley, 245 US 60 (1917), LRA (1918c) 217.

State v. Gurry, 88 Atl. 546, 47 LRA (NS) 1087 (Md. 1918).

State v. Darnell, 81 SE 338, 51 LRA (NS) 332 (NC 1914).

Carey v. City of Atlanta, 84 SE 456, LRA (1915d) 684 (Ga. 1915).

Harden v. City of Atlanta, 93 SE 401 (Ga. 1917).

Corrigan v. Buckley, 271 US 323, 70 (L. ed.) 969 (1925).

Burke v. Kleiman, 277 Ill. App. 519 (1934).

OPINION OF FOREGOING SYNOPSIS

You have requested an opinion as to what steps may be taken, presumably by the city government, to restrict persons of certain races in establishing themselves as residents in a given section of the city. In your request, you refer to the recent case in which a Chinese family, citizens of the United States, purchased a home in your ward and prepared to move in, only to have residents of the neighborhood register protest because these people are Chinese.

This problem raises a fundamental question of law and of civil liberties and deserves to be gone into at some length, not only because no opinion on this important question ever has been rendered before by this department, so far as our records show, but also because in these particular times all persons interested in the preservation of the American system of democratic government constantly must be on the alert to prevent actions that strike at the rights of minority groups under no matter what guise.

So long ago as 1879, in a case that incidentally involved a city ordinance directed at the Chinese in California, Mr. Justice Stephen J. Field of the United States Supreme Court made this statement: "It is certainly something in which a citizen of the United States may feel a generous pride that the government of his country extends protection to all persons within its jurisdiction; and that every blow aimed at any of them, however humble, come from what quarter it may is 'caught upon the broad shield of our blessed constitution and our equal laws.'" [*Ah Kow v. Nunan*, 5 Sawyer's 563 (1879).] That is a sentiment that clearly strikes a truly American note and it seems well to take this occasion to emphasize that sentiment in view of certain peculiar racial doctrines that flourish in certain nations abroad and which, unfortunately, small groups in this country would attempt to inculcate here. I am impressed that it is a legal as well as moral duty to resist such doctrines in this country, and hence the emphasis on this point in this opinion.

Certainly since the Civil War, when full civil rights were extended to the Negro race in this country by adoption of the Fourteenth Amendment to the United States Constitution, there has never been any doubt that discrimination against members of any race in any matter simply on the question of race is contrary to our system of government and our structure of law. In view of the language of the Fourteenth Amendment to the Federal Constitution, legislation discriminating against residents of this country, whether citizens or not, merely on the basis of race, is clearly unlawful. It would seem appropriate to quote herewith the pertinent section of the Fourteenth Amendment, which is:

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Merely quoting that section of the Federal Constitution effectively disposes of the possibility that the city of Chicago, or any other city, could adopt any ordinance designed to prevent persons of certain races, whether oriental, negro or caucasian, from living where they choose to live under the same terms as persons of any other race. Nor could the city effect such a restriction by any other compulsory means. This is not to say whether or not it is desirable for races to be segregated under certain circumstances. It may very well be desirable for the greater happiness of all parties concerned. But such action must be voluntary and by private arrangements. Government may not act.

That such is the law was emphatically made clear by the United States Supreme Court in the case of *Buchanan v. Warley* [255 U. S. 60 (1917)]. This case involved an ordinance adopted by the city of Louisville to prevent colored people from moving into neighborhoods in which white people predominated, and vice versa, the avowed purpose being to diminish the possibility of racial conflicts. A white man contracted to sell to a colored person property which was situated in a block containing ten residences, eight of which were occupied by white people. The contract for the purchase of the property contained, as an essential part of the agreement, a provision that the purchaser should not be required to accept a deed unless he should have the right, under existing laws and ordinances, to occupy the property as a residence. The purchaser refused to perform the contract upon the ground that the ordinance in question prevented his occupancy of the property for residential purposes. The plaintiff instituted a suit for specific performance, asserting the invalidity of the ordinance as violating the Fourteenth Amendment of the Constitution of the United States. The Court of Appeals of Kentucky [165 Ky. 559, 177 S. W. 472 (1915)], held that the ordinance was valid and constituted a defense to the action for specific performance. The Supreme Court of the United States stated the question before it in the following language: "The concrete question is: May the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the states, or by one of its municipalities, solely because of the color of the proposed occupant of the premises?" (L. R. A. 1918C 217.) After discussing at some length the effect of the Thirteenth and Fourteenth Amendments to the Federal Constitution, the court stated its conclusion that the judgment of the Kentucky Court of Appeals must be reversed in the following language:

"We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the state, and is in direct violation of the fundamental law enacted in the 14th Amendment of the Constitution preventing state interference with property rights except by due process of law. That being the case, the ordinance cannot stand."

There have been some relatively recent decisions by various state supreme courts on this question, and the state courts have not been wholly in agreement, some indicating that such ordinances might have been valid as an exercise of police power if backed by statutory authority and others indicating that the reasonableness of the restrictions would be the test. A review of some of these cases is given herewith:

In *State v. Gurry* [88 Atl. 546, 47 L. R. A. N. S. 1087 (Md. 1918)], a segregation ordinance of the city of Baltimore made it unlawful for any white person to move into any building located on any block the houses on which block were occupied or used in whole or in part as residences by colored persons, and also made it unlawful for colored persons to move into any building situated on any block on which the houses were occupied or used in whole or in part as residences by white persons. While the Maryland Court expressed the opinion that the object sought to be accomplished by the ordinance was one which properly admitted of the exercise of the police power, it held that certain provisions of the particular ordinance before it were unreasonable and that the ordinance was therefore invalid.

In *State v. Darnell* [81 S. E. 338, 51 L. R. A. N. S. 332 (N. C. 1914)] the court considered the validity of an ordinance of the city of Winston which made it unlawful for any colored person to occupy as a residence any house in any block on which a greater number of houses were occupied as residences by white people than by colored people. Another section of the ordinance applied a similar restriction against the occupation by white

people of residences on blocks on which there were more houses occupied by colored residents than by white. The court held that the city lacked the requisite statutory authority to enact the ordinance and that the statutory grant of power relied upon in support of the ordinance "to make ordinances, rules and regulations for the better government of the town not inconsistent with * * * the law of the land, as they may deem necessary * * *" was insufficient to authorize the enactment of the ordinance in question. Upon this proposition the court said:

"If the board of aldermen is thereby authorized to make this restriction, a bare majority of the board could, if they may 'deem it wise and proper,' require Republicans to live on certain streets, and Democrats on others, or that Protestants shall reside only in certain parts of the town, and Catholics in another, or that Germans or people of German descent should reside only where they were in the majority, and that Irish and those of Irish descent should dwell only in certain localities designated for them by the arbitrary judgment and permission of a majority of the aldermen. They could apply the restriction as well to business occupations as to residences, and could prescribe the localities allotted to each class of people without reference to whether the majority already therein is of the proscribed race, nationality, or political or religious faith." [51 L. R. A. N. S. 334 (N. C. 1914).]

In *Carey v. City of Atlanta* [84 S. E. 456, L. R. A. 1915D 684 (Ga. 1915)] an ordinance similar to that involved in the Maryland case of *State v. Gurry*, *supra*, was before the court, and it was held that because the ordinance interfered with an important right of property, the *jus disponendi*, or right to dispose of property, the ordinance violated the provisions of the Fourteenth Amendment to the Constitution of the United States. The Georgia court concluded its opinion with these words:

"The effect of the ordinance under consideration was not merely to regulate a business or the like, but was to destroy the right of the individual to acquire, enjoy, and dispose of his property. Being of this character, it was void as being opposed to the due process clause of the Constitution; and the judge erred in refusing to grant the injunction." (L. R. A. 1915D 689.)

A few years later a different view was taken by the Georgia court in *Harden v. City of Atlanta* [93 S. E. 401 (Georgia, 1917)]. In that case an ordinance of the city of Atlanta similar to that involved in the *Carey* case was sustained upon the ground that it contained a reservation for the protection of rights existing at the time of its adoption which was lacking in the ordinance involved in the *Carey* case. And it was further held that a race segregation ordinance did not violate either the State or the Federal Constitution.

However, since the United States Supreme Court case of *Buchanan v. Warley*, cited *supra*, decided in 1917, the invalidity of any effort by a state or municipality to impose residential restrictions based solely upon differences in color or differences in race is no longer open to doubt. In view of that decision it is not even necessary to consider whether the city of Chicago has been given statutory authority for such an ordinance—which the state has not given—for even so the ordinance would be of no effect.

I reiterate that this opinion does not presume to pass upon the merits or demerits of racial segregation. Quoting the United States Supreme Court in *Buchanan v. Warley* "That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges." (Cited *supra*, at 80.)

For the information of your constituents, I point out that there is a private legal remedy, the device of restrictive covenants whereby individual owners of property, acting as individuals, may restrict the sale or use of their property on the basis of race, if they so desire. However, such covenants do not involve any governmental action and therefore there is no need to discuss their validity here, although I refer you to the cases of *Corrigan v. Buckley* [271 U. S. 323, 70 L. Ed. 969 (1925)] and *Burke v. Kleiman* [277 Ill. App. 519 (1934)].

PETITION FOR CHANGE OF STREET NAME

(No. 10048—Chairman, Committee on Local Industries, Streets and Alleys—M. H. F.—July 11, 1939—8 pp.)

The City Council cannot be compelled to accept and act upon a petition filed under the amendment to the Cities and Villages act requiring a change of street name upon petition under certain conditions, unless such petition when filed meets the full requirements of the statute by containing the signatures of at least sixty per cent of the owners of property abutting on the street the name of which is sought to be changed. Hence the City Council is not required to act upon supplemental petitions or any petitions other than the petitions which have already been verified at the time the original petition was filed.

Citations:

Statute: Ill. Laws (1937), p. 390.

Cases: Zeo v. Lester et al., 241 Mass. 340 (1922).

Hagerty v. City of Chicago, 360 Ill. 97 (1935).

People ex rel. Thompson v. Barnett, 344 Ill. 62 (1931).

Other reference: 19 Ruling Case Law, p. 893.

OPINION OF FOREGOING SYNOPSIS

Your communication of recent date states that on August 17, 1938, an ordinance with a petition attached proposing to change the name of Haussen court to N. Crawford avenue was introduced in the City Council and referred to the Committee on Local Industries, Streets and Alleys; that subsequently on October 4, 1938 a petition supplemental to the petition first mentioned was introduced in the City Council and referred to the committee; that on September 7, 1938 an ordinance with petition attached proposing to change the name of N. and S. Pulaski road to N. and S. Crawford avenue was introduced in the City Council and referred to the Committee on Local Industries, Streets and Alleys; that subsequently on October 4, 1938 a petition supplemental to the petition of September 7, 1938 was introduced in the City Council and referred to the committee; and that under date of November 15, 1938, the Committee on Local Industries, Streets and Alleys referred all of the above mentioned petitions to the Commissioner of Public Works for verification of signatures and report as to what percentage of the frontage on each of said streets the verified signatures represent. You further state that at a meeting of the Committee on Local Industries, Streets and Alleys of the present City Council which was organized April 12, 1939, the Commissioner of Public Works returned the said petitions and reported that the verified signatures on the original and supplemental petitions for change of name of N. Haussen court represent a frontage of 1174.70 feet which is 89.65 feet less than 60 per cent of the total frontage on the street, and that the verified signatures on the original and supplemental

petitions for change of name of N. and S. Pulaski road represent a frontage of 94796.76 feet which is 9727.90 feet less than 60 per cent of the total frontage on that street. Our opinion is requested as to whether under the State law covering the changing of street names by city councils the committee in the two pending matters above referred to is confined to taking action on the respective petitions as they now exist and have been verified, or whether the committee or the City Council may permit the petitions to be added to by the filing of supplemental petitions or permit signatures which have been rejected on the verified petitions to be corrected.

It appears that in the matter herein presented for consideration that the City Council has not yet acted upon either one of the basic or supplemental petitions and that by a resolution passed April 12, 1939 (C. J. 13) all matters referred to the various committees of the City Council during the council years 1937 to 1939, or previous years, and undisposed of by the committees of the old City Council were referred to appropriate committees of the present council.

We entertain no doubt concerning the propriety of the City Council or your committee giving consideration to petitions filed prior to April 4, 1939, the date of the city election at which the personnel of the council was changed, or filed prior to the organization on April 12, 1939 of your committee, as the courts have held that a city council is a continuous body. *Zeo v. Lester, et al.*, 241 Mass. 340, 135 N. E. 458; 19 R. C. L. page 893.

More difficult problems, however, are involved respecting the constitutionality of the amendment to section 23 of article V of the Cities and Villages act, which purports to give rights to owners of property on a street to name or change the name thereof, and if the amendment should be thought to be constitutional, as to the construction to be given it.

Prior to the time when it was amended by an act approved July 8, 1937 (Laws of 1937, page 390), section 23 conferred power on city councils to name and change the name of any street, avenue, alley or other public place. The amendment added two provisos. As amended it reads as follows:

"To name and change the name of any street, avenue, alley or other public place, provided no change of name shall be made unless a proposition for such change has first received the written consent of the owners of at least sixty per cent (60%) of the property abutting thereon; And, provided further, that the city council or board of trustees, as the case may be, shall change the name of any street, avenue, alley or public place upon a petition signed by the owners of at least sixty per cent (60%) of the property abutting thereon, setting forth the name desired; but said city council or board of trustees shall not assign to such street, avenue, alley or public place the same name as is used to designate any other street, avenue, alley or public place."

Construing the section before amendment, the Supreme Court of Illinois in the case of *Hagerty v. City of Chicago* (1935), 360 Ill. 97, which was an injunction suit by property owners to restrain the city and its officers from carrying out the provisions of an ordinance changing the name of Crawford avenue to Pulaski road, the court held that the naming of streets is a legislative matter, and where the General Assembly has delegated such power to the municipalities, courts may not disturb its exercise on the ground that such exercise is unreasonable.

The 1937 amendment to section 23 of Article V of the Cities and Villages act is a most unusual legislative enactment. Article V is a compendium of grants of power consisting of more than one hundred

sections, each of which contains one or more grants of power to the legislative bodies of municipalities. To section 23, theretofore containing an express grant of power to municipal lawmaking bodies to name and change the name of any street, avenue, alley or other public place, there has been added by the amendment two provisos: (1) that no change of name shall be made unless a proposition for such change has first received the written consent of the owners of at least 60 per cent of the property abutting thereon, and (2) a mandatory proviso that the municipal legislative body shall change the name of any street, avenue, alley or public place upon a petition signed by the owners of a like percentage of property, setting forth the name desired, and prohibiting the assignment of a name already used to designate any other street, avenue, alley or public place. This last mentioned proviso which is in effect a grant of power to individuals who are owners of property is not only anomalous but of doubtful constitutionality. It deprives city councils of power to exercise their lawmaking functions and vests such power in individuals, and for this reason it is not unlikely that it would be held by the courts to be an unlawful delegation of legislative authority. If the owners of property abutting on a public street may resort to the provisions contained in this proviso and thereby name or change the name of the street, they would be exercising the legislative prerogatives of a legislative branch of the government.

Except in those cases in which the power has by express limitation or necessary implication been withheld, all the legislative power inherent in the people of the State has been vested by the constitution in the General Assembly, and this power the General Assembly may not delegate to a group of individuals. While the legislature may delegate legislative functions to subordinate legislative bodies, such as city councils, it is very doubtful whether it may divest itself or any subordinate legislative body of the power to legislate. In the case of *The People ex rel. Thompson v. Barnett*, 344 Ill. 62, which case involved the constitutionality of the 1929 amendment to the Jury Commissioners act, an amendment to authorize selection of women jurors, the Supreme Court of Illinois held that while the legislature might vest in municipal corporations certain powers of legislation on subjects of purely local concern connected with their municipal affairs, nevertheless under the constitution of Illinois the General Assembly was the sole depository of the legislative power of the State. Accordingly the amendment to the Jury Commissioners act, which authorized judges of courts of record to appoint jury commissioners and prescribe their powers and duties and to authorize the selection of women as jurors, was held to be an unconstitutional delegation of legislative powers and therefore void. A somewhat similar situation is presented by the 1937 amendment to section 23 of Article V of the Cities and Villages act herein considered.

Fundamentally the authority to fix the names of streets within a municipality belongs exclusively to the municipal law-making body and is a matter in which all the people of the municipality are concerned. It cannot, we believe, be said that the individuals residing upon or owning property on a particular street are the only ones interested in the name of that street. Furthermore there may be conditions and circumstances making it desirable that a particular name should be selected which may not be known to the owners of property on a particular street. For this reason and others which might be mentioned it has uniformly been held that the naming of streets was exclusively a legislative matter.

Independent of the constitutional question involved, it seems obvious to us that as the proviso above discussed is in derogation of the municipal legislative body's otherwise exclusive prerogative to name and change the names of streets, the proviso must be construed strictly in favor of the pre-existing right and against the delegation of a power to certain

property owners to exercise legislative functions. Adopting the rule of strict construction applicable to the case, it would seem to follow that before the City Council of the City of Chicago could be compelled to act under the proviso it might properly require the submission to it of a completed petition signed by the owners of at least 60 per cent of the property abutting on N. and S. Pulaski road. While in administrative matters, such as acting on frontage consent petitions, the filing of which is required by city ordinances, the council might exercise liberality in receiving additional signatures and supplemental petitions, our opinion is that it could not be compelled to accept and act upon a petition filed under the amendment to section 23 of article V of the Cities and Villages act unless such petition when filed were to meet the full requirements of the statute by containing at least 60 per cent of the owners of property abutting on the street the name of which was sought to be changed. Our conclusion therefore is that neither your committee nor the City Council is required to act upon supplemental petitions or any petitions other than the petitions which have already been verified.

POWER OF CITY COUNCIL TO LIMIT THE HEIGHT OF CERTAIN BUILDINGS

(No. 10044—Alderman, 9th Ward—L. V. R.—June 30, 1939—4 pp.)

The City Council has the power to limit the height of buildings, but the power to do so must be exercised strictly in accordance with the terms of the statute.

Citations:

Statute: Chicago Zoning act, secs. 1 and 4.

Case: Michigan-Lake Building Corporation v. Eva H. Hamilton et al., 340 Ill. 284 (1931).

OPINION OF FOREGOING SYNOPSIS

We hereby acknowledge receipt of your letter dated June 28, 1939 with copy of an order amending the building code limiting the height of commercial, apartment and hotel buildings attached.

You ask us to advise you whether the city council has the power of limiting the heights of buildings as suggested in said order.

Section 1 of the Zoning Act (Illinois Revised Statutes 1937, page 356) provides as follows:

"In addition to existing powers and to the end that adequate light, pure air and safety from fire and other dangers may be secured, that the taxable value of land and buildings throughout the city, village or incorporated town, may be conserved, that congestion in the public streets may be lessened or avoided, and that the public health, safety, comfort, morals and welfare may otherwise be promoted, the city council in each city, and the president and board of trustees in each village and incorporated town shall have the following powers:

"To regulate and limit the height and bulk of buildings hereafter to be erected; to regulate and limit the intensity of the use of lot areas, and to regulate and determine the area of open spaces, within and surrounding such buildings; to classify, regulate and restrict the location of trades and industries and the location of buildings designed for specified industrial, business, residential and other uses; to divide the entire city, village or incorporated town into districts of such

number, shape, area and of such different classes (according to use of land and buildings, height and bulk of buildings, intensity of the use of lot area, area of open spaces, or other classification) as may be deemed best suited to carry out the purposes of this Act; to fix standards to which buildings or structures shall conform therein; to prohibit uses, buildings or structures incompatible with the character of such districts respectively; and to prevent additions to and alteration or remodeling of existing buildings or structures in such a way as to avoid the restrictions and limitations lawfully imposed hereunder. In all ordinances passed under the authority of this Act, due allowance shall be made for existing conditions, the conservation of property values, the direction of building development to the best advantage of the entire city, village or incorporated town, and the uses to which property is devoted at the time of the enactment of any such ordinance. The powers of this Act given shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted."

Section 4 of the same act (page 358) is as follows:

"The regulations imposed and the districts created under the authority of this Act may be amended from time to time by ordinance after the ordinance establishing same has gone into effect, but no such amendments shall be made without a hearing before some commission or committee designated by such council or board of trustees. At least fifteen days' notice of the time and place of such hearing shall be published in an official paper or a paper of general circulation in such municipality. In case of written protest against any proposed amendment, signed and acknowledged by the owners of twenty per cent of the frontage proposed to be altered, or by the owners of twenty per cent of the frontage immediately adjoining or across an alley therefrom, or by the owners of twenty per cent of the frontage directly opposite the frontage proposed to be altered as to such regulations or district, filed with the clerk of the city, village or incorporated town, such amendment shall not be passed except by the favorable vote of two-thirds of all of the members of the city council in cities or of the members of the board of trustees in villages or incorporated towns."

It is apparent therefore that the city council has the power to limit the height of buildings, but the power to do so must be exercised strictly in accordance with the terms of the statute.

In the case of the *Michigan-Lake Building Corporation v. Eva H. Hamilton, et al.*, 340 Ill. 284, at page 294, the court in passing upon the exercise of such power said:

"The foregoing sections of the Zoning statute disclose the additional powers given to municipalities for the regulation, supervision and control of property generally and of buildings and their occupancy, as well as providing for such changes in any established regulations as may from time to time be found necessary. The statute, we think, contemplates the same careful, serious and intelligent consideration of an amendment to a zoning ordinance as is required in the preparation and enactment of an original ordinance on zoning. Some of the necessary requirements in the consideration and enactment of a zoning ordinance are, that due allowance shall be made for existing conditions, for the conservation of property values, for the direction of building development to the best advantage of the entire city, and for the uses to which property is devoted at the time of the enactment of the ordinance."

And further at page 297,

"Undoubtedly, under section 4 of the Zoning statute, proper and necessary amendments to an original zoning ordinance are authorized. It is primarily the province of the municipality to which the

zoning function is committed, to draw the line of demarcation as to the use and purpose to which property shall be assigned or placed, and it is neither the province nor duty of courts to interfere with the discretion with which such bodies are invested, in the absence of a clear showing of an abuse of that discretion. (*Minkus v. Pond*, 326 Ill. 467.) Where the conclusion or action of a city council is fairly debatable, a court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question. (*Zahn v. Board of Public Works*, 274 U. S. 325.)"

It is our opinion that the city council has the power to limit the height of buildings, but the power to do so must be exercised strictly in accordance with the terms of the statute.

USE OF LOUD SPEAKERS IN THE STREETS

(No. 9996—Commissioner of Police—M. H. F.—May 4, 1939—4 pp.)

The City Council has the power to prohibit by ordinance the making of improper noises on the public ways. The use of sound amplifiers operated from trucks is not specifically prohibited in the present ordinance but the ordinance may be amended by specifically prohibiting them.

Citations:

Statutes: IRS '37, 24: 7 to 20, 23 to 25, 59, 66, 72 and 75.

Ordinances: Code '31: 4194, 4210.

Cases: Goodrich v. Busse, 247 Ill. 366 (1910).

Tisdale v. The Town of Minonk, 46 Ill. 9 (1867).

OPINION OF FOREGOING SYNOPSIS

The department is in receipt of your letter of April 21, 1939, in which you quote a letter received by you from the President of the Gartland Steamship Company, 208 S. LaSalle Street complaining against the use of loud speakers in the financial district and also your communication of April 24, 1939 which returns the letter of April 18, 1939 received from the President of the State Street Council which letter also protests against noise making devices and loud speakers operated from trucks patrolling State Street. You request our opinion as to your authority under the Municipal Code to prohibit the operation of the devices.

The following sections of the Revised Chicago Code of 1931, as amended, are pertinent:

"4194. *Calling of wares and using mechanical devices for advertising goods prohibited.*) No person shall make, or cause, permit or allow to be made, upon a public street, or in such close proximity to a public street as to be distinctly and loudly audible upon such public street, any noise of any kind by crying, calling or shouting or by means of any whistle, rattle, bell, gong, clapper, hammer, drum, horn, hand organ, mechanically operated piano, other musical instrument, or similar mechanical device or wind instrument, for the purpose of advertising any goods, wares or merchandise or of attracting attention or inviting the patronage of any person to any business whatsoever; provided, that the said restrictions shall not apply to any public alley in the city between the hours of 11 a. m. and 6 p. m.

"Every person who shall violate any of the provisions of this section shall be fined not less than two dollars nor more than fifty dollars for each offense; and such person shall be deemed guilty of a separate and distinct offense for every day during which such person shall continue such violation."

"4210. *Disorderly conduct—penalty.*) All persons who shall make, aid, countenance or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city; * * * shall be deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally subject to a fine of not less than one dollar nor more than two hundred dollars for each offense."

Cities in Illinois have been granted broad powers to regulate the use of streets and also to abate nuisances. Sections 7-20, 23-25, 59, 66, 72, and 75, Article V, Chap. 24, Illinois Revised Statutes. By Section 72 express power is given "to prevent, and suppress * * * noises, disturbances, * * * in any public or private place."

An ordinance similar to Section 4194 was examined by the Supreme Court of Illinois and upheld in the case of *Goodrich v. Busse*, (1910), 247 Ill. 366. The court in its opinion expressed the view that the city council had "the right and authority to put a stop to loud and boisterous outcries of over-zealous and anxious sellers of goods and wares on the public streets."

So also in the earlier case of *Tisdale v. The Town of Minonk*, (1867) 46 Ill. 9, the same court held that a municipality "had authority to declare by ordinance, that making loud and unusual noises to the disturbance of the quiet and peace of the town should be an offense punishable by fine * * *."

We entertain no doubt concerning the power of the city council to prohibit by ordinance the making of improper noises on the public ways, but it is not clear to us that by the ordinances above quoted, or any other provision of the municipal code, the council has prohibited the making of improper noises except when such noises are made in connection with the sale of merchandise, inviting patronage, or as a breach of peace or act of disorderly conduct. Since sound amplifiers are not specifically mentioned in either of the above quoted sections, if the city council wishes to prohibit their use on the public ways, it is recommended that section 4194 be amended by making specific mention of them. We transmit herewith suggested form of amendatory ordinance.

Be it Ordained by the City Council of the City of Chicago:

Section 1. That Section 4194 of the Revised Chicago Code of 1931, as amended, be and the same hereby is amended by striking out the first paragraph of said section, as printed, and substituting in lieu thereof a new paragraph reading as follows:

4194. *Sundry noises prohibited.*) No person shall make, or cause, permit or allow to be made, upon a public way, or in such close proximity to a public way as to be distinctly and loudly audible upon such public way, any noise of any kind by crying, calling or shouting or by means of any whistle, rattle, bell, gong, clapper, hammer, drum, horn, hand organ, mechanically operated piano, other musical instrument, wind instrument, sound amplifier, or similar mechanical device; provided, that the said restrictions shall not apply to any licensed peddler crying or calling for the purpose of advertising goods, wares or merchandise when lawfully using any public alley in the city between the hours of 11 a. m. and 6 p. m.

Section 2. This ordinance shall be in force and effect from and after its passage and due publication.

B. POLICE DEPARTMENT

APPOINTMENT OF SPECIAL POLICE

(No. 9931—*Commissioner of Police—M. H. F.—December 13, 1938—2½ pp.*)

The City Council has power by ordinance to provide for the appointment of special patrolmen and policemen, and this power is not affected by the passage of the State law licensing private detectives.

Citations:

Statutes: IRS '37, 24: 65.65, 65.67, 65.90.

Cities and Villages act, art. V, secs. 66, 68, 91.

Ordinances: Code '31: 3743 to 3756.

REMOVAL OF DISABLED POLICEMAN

(No. 9830—*Commissioner of Police—F. V. M.—May 18, 1938—2½ pp.*)

If the disability of a policeman is such as to warrant his removal from the Police Department, the Commissioner of Police should prefer charges against him before the Civil Service Commission. A hearing on the charges by the Civil Service Commission will effect a final and definite disposition of the matter, while an acceptance of the policeman's resignation would not positively terminate his services with the Department until 30 days had elapsed, during which period the resignation could be withdrawn.

Citations: Civil Service Commission rules and regulations, rule IX, sec. 2.
18 Op. Corp. Coun. 195 (No. 7209).

OPINION OF FOREGOING SYNOPSIS

In reply to your letter of May 17, 1938 with reference to Sergeant Wm. J. Sheehan who has been carried "sick" on your medical roll since October 27, 1937, and whose retirement has been recommended by the Chief Surgeon of your department and who, when advised of the Chief Surgeon's findings with instructions to apply for retirement pension, has refused to do so, please be advised as follows:

If the disability of Sergeant Sheehan is such as to warrant his removal from the Police Department, the Civil Service Commission should proceed with the hearing on the charges preferred against him by you after his refusal to apply for retirement pension, instead of your accepting his resignation which he has since suggested. A hearing on the charges in accordance with the Civil Service Act and the rules of the Civil Service Commission will effect a final and definite disposition of the matter, while an acceptance of Sergeant Sheehan's resignation would not positively terminate his services with the department until thirty days had elapsed, the period within which said resignation could be withdrawn in accordance with Section 2 of Rule IX of the Civil Service Commission.

It is the better practice to proceed with the hearing on the charges for the reasons expressed in an opinion given the City Comptroller by us under date of October 23, 1931, the substance of which is as follows:

Where suspension has been made with notice that charges are to be preferred, no resignation should be accepted by the head of a department; if it is considered at all, it should be as a part of the hearing on the charges preferred.

To safeguard the city's interest against the possible repudiation of the resignation of an employee who has been suspended while charges against him are being preferred before the Civil Service Commission, the filing and hearing of charges and their disposition by the Civil Service Commission should be proceeded with immediately.

People v. Harding, 224 Ill. App. 198 (1922).

In the foregoing case the court said:

"The relator was given the alternative of signing his resignation or having charges filed against him. The filing of such charges whether sustained or not would have subjected him to serious embarrassment, inconvenience and expense. A resignation under such circumstances cannot be said to have been given by the party resigning of his own free will. Such a resignation might have been repudiated at any time. In order to constitute a complete and operative resignation there must be an intention to relinquish a part of the term accompanied by the act of relinquishment. *Biddle v. Willard*, 10 Ind. 62; *State v. Ladeen*, 104 Minn. 255; *People v. Voorhis*, 66 Hun (N. Y.) 88."

SPECIAL POLICEMEN TO GUARD YACHTS IN GRANT PARK HARBOR

(No. 9793—Commissioner of Police—C. P. H.—March 10, 1938—
2½ pp.)

The Commissioner of Police may appoint an employee of the Chicago Yacht Club as a special policeman to guard from theft portable property which is located on yachts of members of the Chicago Yacht Club and the Columbia Yacht Club moored in the Monroe street anchorage of the Grant Park harbor by virtue of permits issued by officials of the United States Coast Guard.

Citations:

Statute: IRS '37, 23: 83.

Ordinance: Code '31: 3744.

Case: Dupont v. Miller, 310 Ill. 140 (1924).

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your letter wherein you request an opinion whether you have authority to appoint Herbert Eldean, an employe of the Chicago Yacht Club, as a special policeman to guard portable property from theft, which is located on yachts of members of the Chicago Yacht Club and the Columbia Yacht Club, which are moored in the Monroe Street anchorage of the Grant Park Harbor by virtue of permits issued by officials of the United States Coast Guard.

Please be advised that the Grant Park Harbor comprises that basin of the waters of Lake Michigan lying between the breakwater, located approximately one thousand yards from the shoreline, from Madison

street to Roosevelt road, which waters come within the jurisdiction of the general police powers of the city pursuant to the authority delegated by the state in Section 83 of chapter 23, Illinois Revised Statutes 1937, which provides:

"The city or village government shall have jurisdiction upon all waters within or bordering on the same, to the extent of three miles beyond the limits of the city or village, but not to exceed the limits of the State. * * *

In the case of *Dupont v. Miller*, 310 Ill. 140, the court in passing upon the jurisdiction of the State over navigable waters stated:

"By the ordinance of 1787 establishing the Northwest Territory, the State of Illinois has full and complete jurisdiction over all navigable waters within its borders, subject only to the power of the Federal government to enact such legislation and make such regulations as relate to interstate commerce. (*Economy Light and Power Co. v. United States*, 256 U. S. 113; *Cummings v. City of Chicago*, 188 id. 410.)"

The Revised Chicago Code, 1931, section 3744 provides:

"The Commissioner of Police shall have power, on the application of any person or persons showing the necessity therefor, to appoint and swear in any number of special patrolmen to do special duty at any fixed place in the city, at the charge and expense of the person or persons by whom the application is made. Any person who is an applicant for appointment as a special patrolman shall appear in person for examination at such place or places as may be designated by the commissioner of police. * * *

In view of the provisions of the aforesaid statute which extends the jurisdiction of the city over the waters of Lake Michigan in Grant Park Harbor and the provisions of Section 3744 of the Code which vests you with authority to appoint special policemen in a circumscribed territory within the jurisdiction of the city, it is our opinion that you may appoint Mr. Herbert Eldean as a special officer to protect property on the yachts in the said harbor in accordance with the provisions of the Code relative to the appointment of such officers.

LIABILITY FOR HOSPITAL BILLS OF MUNICIPAL COURT DEPUTY BAILIFF INJURED IN COURT ROOM RIOT

(No. 9802—Chairman, Committee on Finance—C. N.—April 5, 1938—
3 pp.)

The City is liable for the hospital bills of a Municipal Court deputy bailiff injured while attempting to quell a riot in a court room. Deputy bailiffs of the Municipal Court are ex officio police officers of the City and are entitled to the same benefits as regular police officers of the City.

Citations: IRS '37, 24: 869a; 37: 372.

OPINION OF FOREGOING SYNOPSIS

The above claim has been submitted to us for an opinion as to the city's liability.

From the claimant's statement, our investigator's report and other documents the facts appear to be as follows:

This is a claim by Phillip Brankin, 3610 W. 64th place, in the sum of approximately \$111.00 for hospitalization and doctor's bills resulting from a court room riot at 11 A. M. of March 5, 1935, at which time the claimant was performing his duty as a Deputy Bailiff of the Municipal Court of Chicago and in the progress of the riot by Negro cultists, received a bullet wound.

It appears that this Deputy Bailiff was performing his regular duties in the Court of Domestic Relations, room 903 of the Municipal Court Branch at 1121 S. State street, when an assistant to Chief Deputy Bailiff Williams instructed him to go to room 900. Upon his arrival the court room was in an uproar; there was a great deal of screaming and shouting interspersed with pistol shots, one of which struck the claimant lodging in his right lung. He was taken to a doctor's office on the first floor of the building by members of the Police Department and then removed in a Fire Department ambulance to St. Luke's Hospital, where he remained for eighteen days with Dr. H. E. Jones in attendance. His salary as a Deputy Bailiff was paid in full during his period of confinement.

Deputy Bailiffs of the Municipal Court of Chicago are provided for by Statute as set forth in Section 17 of the Municipal Court of Chicago Act. A majority of the judges of the said court determine how many such deputies shall be appointed by the bailiff and fix their salaries within limits detailed in the hereinabove cited section. These Deputy Bailiffs are ex officio police officers of the City of Chicago and their salaries are payable out of the City Treasury in monthly installments.

Section 869a, Chapter 24 of the State Statutes sets forth that the City Council of any city

"May provide by ordinance that in case of an accident resulting in an injury to or death of a policeman or fireman in the employ of such city * * * while in the performance of his duties * * * to secure and provide proper medical care and hospital treatment for any such policeman or fireman. * * *"

Acting under the power thus granted, the Chicago City Council has provided death benefit funds for dependents of deceased policemen and firemen who meet death while performing their duties as set forth in the ordinance of September 9, 1936, page 2283 Journal of the Proceedings of the Chicago City Council for that date, amending certain portions of Article VI, Chapter 5, Revised Chicago Code 1931.

In responding to the riot call, although he had been engaged in the routine duties of a Deputy Bailiff only a moment before, Brankin was acting in a police capacity even though he may not have been aware of the hazard involved in entering the court room where the riot was in progress. He had obeyed the orders of a superior officer and in doing so had met with serious injuries. In view of the fact that the Statutes designate a Deputy Bailiff as an ex officio police officer of the city, it would be unconscionable in an instance of the kind herein recounted to extend to this officer less consideration than is accorded a policeman under the same circumstances.

For the reasons clearly indicated, we are of the opinion that the interest of the city would be best conserved by satisfying the claim of Deputy Bailiff Phillip Brankin for hospital bills herein described, although we are not in a position to pass upon the reasonableness of the amount claimed.

ARRESTING SPEEDER IN NEIGHBORING TOWN

(No. 9944—*Commissioner of Police—R. N.—January 7, 1939—1½ pp.*)

A policeman pursuing a speeder has the right to follow him into a neighboring town in the same police district, arrest him there, and return him for prosecution to the town in which the law has been violated.

Citation: IRS '37, 24: 421, 422.

DISPOSITION OF UNCLAIMED PROPERTY HELD BY POLICE

(No. 9905—*Commissioner of Police—C. P. H.—November 4, 1938—2½ pp.*)

When the owner of certain articles held by the Department of Police cannot be ascertained and more than 60 days have elapsed since discovery and possession of the articles by the police, the Police Custodian should publish in the official newspaper of the City a description of the articles with notice that they will be sold if not claimed by the rightful owner within 10 days from the date of publication. If the articles are not claimed by the owner within that time, the Police Custodian should sell them at public auction in conformance with the provisions of the revised Chicago code of 1931.

Citation: Code '31: 318.

RELINQUISHMENT OF PROPERTY TAKEN FROM ARRESTED PERSON

(No. 9947—*Commissioner of Police—C. P. H.—January 18, 1939—2 pp.*)

The Police Custodian, unless directed to do so by a writ of replevin, should not relinquish possession of jewelry which had been taken from a person at the time of arrest, to a claimant therefore, when there is not conclusive proof that the claimant has the right to possession.

Citation: IRS '37, 119: 1.

RIGHT TO PROPERTY HELD BY POLICE

(No. 10120—*Commissioner of Police—A. A. P.—October 24, 1939—2 pp.*)

Where two separate demands are made for coins in the possession of the Police Department, the claimants should be required to institute

judicial proceedings directing the Police Custodian to deliver the coins to the established owner.

Citation: Illinois Liquor Control law, art. IX.

Opinion No. 9792 of March 10, 1938, to the Commissioner of Police holds substantially the same as the above opinion.

ARREST RECORD OF ACQUITTED PERSON

(No. 9901—*Commissioner of Police—C. P. H.—December 22, 1938—4½ pp.*)

The Commissioner of Police has no authority to remove, mutilate, destroy, cancel or obliterate the record of arrest of a person who was afterwards acquitted.

Citations:

Statute: IRS '37, 38: 401.

Ordinance: Code '31: 294.

Cases: Miller v. Gillespie, 196 Mich. 423 (1917).

Bartletta v. McFeeley, 113 NJ Eq. 67 (1933).

Matter of Molineaux v. Collins, 177 NY 395 (1904).

IDENTIFICATION RECORDS AFTER CASE NOL-PROSSED

(No. 9943—*Commissioner of Police—C. P. H.—January 6, 1939—2½ pp.*)

When the case of a person arrested and charged with larceny by bailee has been nol-prossed, the Commissioner of Police has the authority to return to the person charged, upon his request, photographs, fingerprints and other records of identification taken of him upon his arrest for such crime.

Citation: IRS '37, 38: 780a, 780e.

EXAMINATION OF RECORD OF POLICE OATHS

(No. 9790—*Commissioner of Police—C. P. H.—March 4, 1938—3 pp.*)

In the absence of a statute to the contrary, only persons who have a special interest in public records are entitled to inspect those records. If the record of the oath administered to a police officer of the City is to be used as evidence in aid of pending or contemplated litigation, the attorney would be entitled to examine the record. The Commissioner of Police, however, is under no legal duty to provide a photostatic copy of the record.

Citations:

Ordinance: Code '31: 294.

Cases: People v. Dime Savings Bank, 350 Ill. 503 (1933).

Chicago Title and Trust Co. v. Danforth, 236 Ill. 554 (1908).

Other references: 18 Ruling Case Law 237.

Rules and regulations of the Department of Police, rules 280, 316.

DEPOSITION OF A POLICE OFFICER BY NON-RESIDENT ATTORNEY

(No. 9973—Commissioner of Police—C. P. H.—March 29, 1939—3 pp.)

The Commissioner of Police should not permit a non-resident attorney to take the deposition of a police officer as to an investigation of a particular police case until the attorney presents a commission issued by a competent court authorizing the taking of the deposition.

Citation: IRS '37, 51: 36.

TRESPASSERS ON LOT

(No. 9842—C. N.—June 13, 1938—2 pp.)

No person may enter upon any land under cultivation unless he be the owner or otherwise duly entitled to enter. The Police Department may stop any trespasses of this nature.

Citations:

Statutes: IRS '37, 38: 565 to 568.

Ordinance: Code '31: 4272.

FINDER'S RIGHT TO PROPERTY HELD BY POLICE

(No. 9865—Commissioner of Police—C. P. H.—July 28, 1938—4 pp.)

The Police Custodian should return lost property to the finder upon demand, as the finder's right is superior to that of the Police Department. Section 318 of the revised Chicago code of 1931, dealing with the sale of property found or seized by the Police Department, is not applicable.

Citations:

Statutes: IRS '37, 50: 27, 28, 30, 34, 35, 37: 357, par. 4 (e).

Ordinance: Code '31: 318.

Other reference: 25 CJ 1136.

C. BOARD OF HEALTH

RESOLUTION DESIGNATING ACTING PRESIDENT OF BOARD OF HEALTH

(No. 9916—Acting President, Board of Health—W. V. S.—November 23, 1938—2½ pp.)

A resolution of the Board of Health designating an Acting President of the Board need not be published to become effective. A copy

of the resolution designating him as such must be sent to the City Comptroller, in order to secure the honoring of payrolls and vouchers for expenditures signed by the Acting President.

Citation: Code '31: 240, 241c.

AUTHORITY OF EMPLOYEES TO SIGN COMMUNICATIONS

(No. 10065—President, Board of Health—W. V. S.—August 2, 1939—2 pp.)

Authority from the Board of Health to designated employees to sign particular documents, communications and notices should be specifically delegated by resolution of the Board.

Citation: Code '31: 239, 240.

RULES CONCERNING VITAMIN D CONTENT OF MILK

(No. 10142—Board of Health—W. V. S.—November 20, 1939—4 pp.)

The City Council has conferred upon the Board of Health the power to prescribe by rules the method and amount by which the vitamin D content of milk may be increased and to require that specified information be placed upon the bottles in which such milk is sold.

Whether a particular regulation adopted by the Board of Health is valid must be determined by an analysis of whether the power to adopt the regulation in question has been conferred on the Board of Health and also whether the subject matter of the regulations is such that the power to adopt regulations may properly be delegated to an administrative body.

Citations:

Statutes: IRS '39, 24: 65.52, 65.74, 65.75, 65.77.

Ordinances: Mun. Code: 154-1, 154-11.

Case: Arms v. Ayer, 192 Ill. 601, 611 (1901).

OPINION OF FOREGOING SYNOPSIS

In your letter of November 15, 1939, you requested our opinion as to "whether the Board of Health has the power to adopt rules and regulations regarding the addition of vitamin concentrates to milk, which the Board has determined may be added in a manner and in an amount approved by the said Board, without hazards to the public health." No specific rules and regulations pertaining to the addition of vitamin concentrates to milk were transmitted with your letter, nor was any reference made to any specific rules and regulations pertaining to this subject.

The powers of the City of Chicago with respect to the protection of the health of the inhabitants of the city have been conferred by the General Assembly of Illinois upon the City Council. The powers granted to the City Council include, among other things, the inspection of food and drinks, the abatement of nuisances, the establishment and regulation of

hospitals and the power "To do all acts, make all regulations, which may be necessary or expedient for the promotion of health or the suppression of disease." (Ill. Rev. Stat., chap. 24, pars. 65.52, 65.74, 65.77.) In addition, the City Council is authorized, by statute, to appoint a Board of Health and to prescribe its powers and duties. (Ill. Rev. Stat., 1939, chap. 24, par. 65.75.)

No power is granted to the Board of Health of the City of Chicago by the provision of the statute which authorizes the establishment of the Board of Health. On the other hand, the statute plainly contemplates that the powers and duties of the Board of Health shall be such as are prescribed by the City Council.

So far as the power of the Board of Health to adopt rules and regulations with respect to the production, processing and distribution of milk is concerned, the existence and the extent of the power must be determined by consideration of the action which has been taken by the City Council upon that subject. The Council has defined vitamin D milk to be milk "the vitamin D content of which has been increased by a method and in an amount approved by the Board of Health." (Municipal Code of Chicago, Sec. 154-1.) It has also included vitamin D milk in its definition of milk products. (Municipal Code of Chicago, Sec. 154-1.) By section 154-11 of the Municipal Code of Chicago it is required that all bottles containing vitamin D milk shall be plainly marked or labeled with the designation "Vitamin D Milk" and with such other information as may be required by the Board of Health.

By these provisions of the Municipal Code the City Council has conferred upon the Board of Health the power to prescribe by rules and regulations the method and the amount by which the vitamin D content of milk may be increased and to require that specified information be placed upon the bottles in which such milk is sold.

It remains to be determined whether or not this delegation of its legislative authority by the City Council to an administrative body, the Board of Health, is such a delegation as will be sustained by the courts. A host of cases have arisen upon the question of whether or not particular grants of power to administrative bodies have amounted to improper delegations of legislative authority. There are few legal questions more difficult to determine than this one. No useful purpose would be served by an extended discussion in this opinion of the cases in which this question has been discussed. The general principle which has been repeatedly stated is that "While the legislature may not divest itself of its proper functions or delegate its general legislative authority, it may still authorize others to do those things which it might properly, yet cannot understandingly or advantageously, do itself." [*Arms v. Ayer*, 192 Ill. 601, 611 (1901).] The statement of this general principle is quite simple; its application however, to specific facts has proved extremely difficult.

If there are numerous alternative methods by which the vitamin D content of milk may be altered, if new methods are being studied and perfected from time to time and if these methods produce varying results and are of varying public health significance, we believe that regulations of the Board of Health which pertain to the method by which and the extent to which the vitamin content of the milk is altered could be sustained in the event of an attack upon their validity.

In every instance in which the Board of Health adopts regulations which have the effect of prescribing permanent rules of conduct the validity of those regulations must be determined by an analysis of first, whether or not power to adopt the regulations in question has been conferred upon the Board of Health, and second, whether or not the subject matter of the regulations is such that the power to adopt regulations may properly be delegated to an administrative body.

DESCRIPTIVE LABELS UPON MILK BOTTLE CAPS

(No. 10000—Acting President, Board of Health—W. V. S.—May 9, 1939—5 pp.)

The Board of Health has no power to prohibit the use of phrases upon a milk bottle cap designed to indicate to the prospective consumer the existence of qualities in addition to those required by ordinance of all milk sold within the City, when such phrases do not indicate the presence of any deleterious substances and the required information is also included on the cap.

Citations:

Statutes: IRS '37, 38: 249a, 56½: 1 to 46.

Ordinance: Code '31: 3090.

OPINION OF FOREGOING SYNOPSIS

You have requested our opinion as to whether or not it is permissible to use upon milk bottle caps words or devices designed to indicate that the milk contained in the bottles was produced from Guernsey cows. One of your letters deals with the use of the statement "Guernsey Milk from All-Guernsey-Herd Farms Exclusively," together with the words "Golden Guernsey" and the trade-mark device of Golden Guernsey, Inc., which is an agency of the American Guernsey Cattle Club. Another letter concerns the use of the words "Guernsey Milk, 4½% Butter Fat," and a third letter deals with the words "Guernsey Milk" or "4.5% Milk from Guernsey Herds."

The ordinances of the city and the regulations of the Board of Health pertaining to the production, processing and distribution of milk prescribe rigid requirements designed to insure a sanitary and healthful supply of milk. A minimum butter fat content and minimum bacterial counts are required. The provisions of the ordinance and of the regulations are being enforced by the board.

The pertinent ordinance is section 3090 of the Revised Chicago Code of 1931, as amended. This section provides that all bottles, cans, packages and other containers of milk or milk products shall be plainly marked with information as to the type of milk contained therein, the permit number, the address of the producer or pasteurization plant, and other required information. The regulations adopted by the Board of Health provide:

"A proof-print or sketch of the bottle cap or cover * * * showing the size and arrangement of the lettering thereon, shall be submitted to and approved by the board of health."

In an opinion addressed to you, dated January 25, 1939, we stated that, in our opinion, the Board of Health should approve the use of a cap containing the information required by Section 3090 of the Revised Chicago Code of 1931, as amended, and containing in addition the words "Dairy Pride" in relatively large letters around the upper portion of the outer edge of the cap. At that time we stated that the use of the words "Dairy Pride" could not be construed as a representation of any fact concerning the nature or quality of the milk contained in the bottles and that the use of these words on a milk bottle cap could not affect the public health.

The problem which you now present is of a different nature. In each instance, the designation sought to be placed upon the cap of the milk

bottle is a representation of a fact pertaining to the contents of the bottle.

We assume that in each of the instances which you have recently brought to our attention, the words and devices in question will be so arranged and printed as to be subordinate to and not to interfere with the information required by ordinance to be placed upon the cap. We also assume that the milk to be sold will comply in all respects with applicable ordinances and regulations. It will, in addition, purport to have characteristics and qualities not required under the ordinances and regulations.

The question presented, therefore, may be thus stated: Has the Board of Health the power to prohibit the use upon a milk bottle cap of words, phrases or devices designed to indicate to the prospective consumer the existence of characteristics or qualities in addition to those required of all milk sold within the city? None of the descriptive phrases to which you have directed our attention indicate the presence of substances deleterious to public health. The relative advantages to individual consumers of Guernsey milk when compared with milk from other breeds of cows and the relative advantages of a butter fat content of $4\frac{1}{2}\%$ as opposed to higher or lower butter fat content may be debatable, but such milk cannot be said to possess injurious qualities nor is its sale prohibited by existing ordinances and regulations.

To hold that no information other than that required by law should be permitted to be placed upon milk bottle caps would result in imparting to all milk sold in the city a degree of anonymity which is not, in our opinion, intended by the ordinances and regulations.

We are not unaware of the fact that the power of the Board to inspect and regulate the production, processing and distribution of milk is limited to the enforcement of applicable ordinances and regulations and that the Board will be without specific authority to guarantee the truth of the representations made on the suggested descriptive labels. We wish to call your attention, however, to the fact that misstatements of fact as to the quality of milk offered for sale will render the offender subject to the penalties provided for violation of the "Pure Food Act" (Ill. Rev. Stats. 1937, Ch. 56 $\frac{1}{2}$, Pars. 1-46) and to the penalties provided in Section 1 of the Act to prevent untrue, deceptive or fraudulent advertising (Ill. Rev. Stats. 1937, Ch. 38, Par. 249-a).

The health of the consumers of milk will be protected by the enforcement of existing ordinances and regulations by the Board of Health; for protection against false advertising consumers must rely upon other agencies.

It is our opinion that the use of milk bottle caps containing the words and devices to which you have directed our attention should be permitted.

REVOCATION OF MILK DISTRIBUTOR'S PERMIT FOR MISBRANDING

(No. 9939—Acting President, Board of Health—W. V. S.—December 30, 1938—3 pp.)

The Board of Health may revoke the milk distributor's permit of a dairy company that has violated the provisions of the Chicago code regarding the labeling of milk by selling cans of milk and cream with labels stating that it was procured upon specified dates from specified

milk plants under the inspection of the Board, when in fact it was not procured upon the dates or from the plants specified on the labels. If the Board is of the opinion that the permit should be revoked, the revocation may be accomplished by a motion duly adopted revoking the permit. The Board should immediately notify the permittee of any such action.

Citation: Code '31: 3084, 3090.

REGULATION OF OUT-OF-STATE MILK PLANT

(No. 9954—*Acting President, Board of Health—W. V. S.—February 3, 1939—2½ pp.*)

A milk receiving station located outside the State is not exempt from the ordinances of the City and the regulations of the Board of Health pertaining to milk produced and processed for distribution and consumed within the City when it ships milk into the City to be sold for human consumption. The ordinances of the City and the regulations of the Board pertaining to milk so produced and processed within the City are valid and have no extra-territorial effect, as they are operative only when the milk and milk products are offered for sale for consumption within the City.

HOMOGENIZING MILK FOR SALE IN THE SUBURBS

(No. 9950—*Acting President, Board of Health—W. V. S.—February 1, 1939—1½ pp.*)

The Board of Health does not have power to refuse permission to a dairy company to pasteurize and homogenize grade "A" milk in its plant in the City for sale in the suburbs of the City.

DELIVERING UNINSPECTED ICE CREAM MIX

(No. 9984—*Acting President, Board of Health—C. P. H.—April 13, 1939—2 pp.*)

If no health hazard would be created, the Board of Health may permit the distribution of both uninspected and inspected ice cream mix from the same delivery vehicles, provided that the uninspected product is properly marked and is not sold within the City.

BOARD OF HEALTH REGULATIONS FOR FROZEN DESSERTS

(No. 9956—*Acting President, Board of Health—W. V. S.—February 15, 1939—2 pp.*)

Regulations of the Board of Health which prescribe permanent rules governing the business of manufacturing and processing frozen desserts for sale in the City, and which are intended to be enforceable by the imposition of penalties, revocation of permits or by other appropriate sanctions, might be subject to attack upon the ground that their adoption was the exercise of a legislative power not delegated, or improperly delegated, to the Board of Health. The substance of these regulations may, however, be properly adopted in the form of an ordinance by the City Council.

Citations:

Statute: IRS '37, 24: 65.77.

Other reference: Board of Health regulations, February 2, 1939, in re: frozen desserts.

REASONABLENESS OF REGULATIONS FOR MATERNITY HOSPITALS

(No. 9814—*President, Board of Health—A. F. G.—April 18, 1938—3½ pp.*)

The rules and regulations of the Board of Health for the conduct of maternity hospitals, maternity divisions of general hospitals, and nurseries for the newborn are reasonable, are within the power granted to the Board of Health, and are not inconsistent with the ordinances of the City.

Citations:

Statutes: Cities and Villages act, art. V, secs. 76 to 78, art. XII, pt. 3, sec. 8.

Ordinances: Code '31: 241c.

Coun. J. (1931-32), p. 1518.

OPINION OF FOREGOING SYNOPSIS

On March 14, 1938 you sent to this office a mimeographed set of rules and regulations which you propose to have printed in booklet form, the title of which is: "Regulations for the Conduct of Maternity Hospitals, Maternity Divisions of General Hospitals, and Nurseries for the New-born."

Accompanying this draft was a compilation of all the statutes relating to the powers of cities in the matter of the regulation of public health and all the ordinances of the City of Chicago passed pursuant to the powers thus granted, including the ordinance regulating the conduct of hospitals, and the building and sanitary regulations for buildings of this class.

We have carefully examined the draft and the statute or ordinance on which the rule or regulation is based and we are of the opinion that there

is a legal basis for each rule set forth and that the same is reasonable. A "Public Health Reason," which fully sets out the necessity for the rule, is given for each rule adopted.

The legislature has given broad powers to the cities of the State in the matter of the protection of public health and the suppression of disease.

Section 76 of Article V of the Cities and Villages Act is in part as follows:

"To appoint a board of health, and prescribe its powers and duties, * * *"

Section 77 of Article V of the Cities and Villages Act provides:

"To erect and establish hospitals and medical dispensaries and to regulate hospitals, medical dispensaries, sanatoria and undertaking establishments, and to direct the location thereof."

Section 78 of the same Article is as follows:

"To do all acts, make all regulations, which may be necessary or expedient for the promotion of health or the suppression of disease."

Section 8 of Part three of Article XII of the same Act reads as follows:

"The City Council shall, by ordinance, be empowered to declare and define nuisances and abate the same, and shall have the power to regulate the location and conduct of hospitals and infirmaries."

Based on these powers the City Council of the City of Chicago has adopted ordinances giving broad powers to the Board of Health in the management and control of all matters and things pertaining to the public health work of the city.

Section 241c of the Revised Chicago Code of 1931, as amended, C.J. Dec. 16, 1931, page 1516 reads in part as follows:

"241c Power to make rules.) Said board of health shall have power to make such rules and regulations in relation to the sanitary condition of the City and for the prevention and suppression of disease, not inconsistent with the provisions of the ordinances of the City, as it may deem necessary or advisable. * * *"

You advise us that before these rules were formulated drafts of the proposed regulations were sent to all the leading medical societies, hospital associations and other interested bodies for suggestions and criticism, and state that many of the regulations as originally drafted were changed and modified at the suggestion of these bodies, so that the present rules are the consensus of these organizations.

You advise us also that on April 13, 1938 a meeting of the Joint Maternal Welfare Committee, representing all the interested bodies, approved the final draft of these rules.

From the foregoing it will be seen that these rules and regulations are not the arbitrary requirements of the Board of Health, but represent the best thought and experience of those who are to be guided by them.

We are therefore of the opinion that these rules and regulations for the Conduct of Maternity Hospitals are reasonable and are within the power granted to the Board of Health and are not inconsistent with any of the ordinances of the City of Chicago.

COMPULSORY HOSPITALIZATION OF PERSON WITH CONTAGIOUS DISEASE

(No. 9823—President, Board of Health—W. V. S.—May 13, 1938—2 pp.)

The Board of Health has power to cause the removal to a hospital of a person afflicted with a communicable or contagious disease. Any person who resists the efforts of the officers or employees of the Board of Health in the performance of their duty to remove a person so afflicted to a hospital for isolation or treatment renders himself liable to arrest and to the imposition of penalties prescribed by the City code.

Citation: Code '31: 2199, 2201, 2221.

MEAT CONTAINING SODIUM SULPHITE

(No. 9969—Acting President, Board of Health—C. P. H.—March 23, 1939—4 pp.)

Meat containing sodium sulphite, which is a derivative of sulphurous acid, is adulterated. The Board of Health, after an inspection and field test which has demonstrated the presence of sodium sulphite in meat, may place "held for inspection" tags thereon and condemn such meat after the field test has been confirmed by laboratory findings.

Citations:

Statute: IRS '37, 56½: 8.

Ordinances: Code '31: 2426, 2428, 2976.

Cases: People v. Quality Provision Company, 367 Ill. 610 (1938).

Chicago v. Scott Peterson Corporation, 295 Ill. App. 620 (1938).

Chicago v. Union Ice Cream Co., 252 Ill. 311 (1911).

OPINION OF FOREGOING SYNOPSIS

In your letter of February 8, 1939, you state that the laboratories of the Board of Health have developed a new field test whereby it will be possible for an inspector to determine whether meat contains sodium sulphite at the time of inspection. You request our opinion whether the Board of Health has authority, first, to apply "held for inspection" tags to meat after a field test by an inspector has demonstrated the presence of sodium sulphite and second, to condemn such meat after the inspector's field test has been confirmed by laboratory findings.

Section 8 of the Pure Food Act (Illinois Revised Statutes 1937, chapter 56½, paragraph 8) provides:

"That for the purpose of this Act, an article shall be deemed to be adulterated * * * Fifth—If it contains any poisonous or deleterious ingredient which may render such article injurious to health * * * and * * * sulphurous acid and all compounds and derivatives thereof are hereby declared unwholesome and injurious."

In the case of *The People v. Quality Provision Company*, 367 Ill. 610 the court upheld the validity of Section 8 of the Pure Food Act and stated:

"Sulphur is defined as 'a salt or ester of sulphurous acid.' From these definitions it is clear that sodium sulphite is a derivative of sulphurous acid."

"The legislature has the power to determine what preservatives are harmful and injurious to the public health. It can declare sulphurous acid and its derivatives adulterants and forbid their use in food products. It is immaterial that appellant added sodium sulphite only to fresh meats. This condition constituted an adulteration * * *."

In the case of *City of Chicago v. Scott Peterson Corporation*, 295 Ill. App. 620, the court stated that sodium sulphite is derived from sulphurous acid and is a chemical which shall not be added to meat under the provisions of Section 2976 of the Revised Chicago Code of 1931 and the standards, rules and regulations of the United States Government for the inspection of meat, referred to in section 2964 of said code. Section 2976 prohibits the sale or exposure for sale of food which is impure, unwholesome or adulterated or to which any harmful or injurious foreign substance has been added.

The courts in the above cases have held that sodium sulphite is a derivative of sulphurous acid. Under the provisions of section 8 of the Pure Food Act, sulphurous acid and all compounds and derivatives thereof are declared unwholesome and injurious and all food products to which they are added are deemed adulterated.

Under the provisions of Section 2426 of the Revised Chicago Code of 1931, it is the duty of the Board of Health to seize all diseased, emaciated, tainted or putrid meat or provisions which from these or other causes may be deemed unwholesome; provided, that in case there is a doubt as to the condition of any such meat, the Board of Health may affix a tag, stamp, seal or other device indicating that such meat has been held for further investigation. Section 2428 of the code gives the City Meat Inspectors authority to seize and condemn any unwholesome meat found in the city and authorizes them to enter any building to inspect or examine any meat contained therein.

There is nothing in these ordinances which is inconsistent with the provisions of the State Pure Food Act above referred to and, therefore, the ordinances as well as the State law governing the subject are enforceable. (*City of Chicago v. Ice Cream Co.*, 252 Ill. 311.)

It is our opinion that the Board of Health has authority to place "held for inspection" tags on meat after a field test has demonstrated the presence of sodium sulphite and to condemn such meat after the field test is confirmed by laboratory findings.

INSPECTION OF LABORATORY AND CLINICAL RECORDS

(No. 10062—President, Board of Health—C. P. H.—July 25, 1939—4 pp.)

The laboratory and clinical records at the Municipal Contagious Disease Hospital are required by law to be kept and therefore are public records. If these public records are to be used as evidence in aid of pending or contemplated litigation they may be examined by

any person interested in such litigation. However, the Board of Health is under no duty to provide a copy of the records.

Citations:

Statute: IRS '37, 110: 259.17.

Ordinance: Code '31: 249.

Cases: People v. Dime Savings Bank, 350 Ill. 503 (1932).

Chicago Title and Trust Co. v. Danforth, 236 Ill. 554 (1908).

Other references: 18 Ruling Case Law, 237.

Op. Corp. Coun. (No. 9971), this volume, p. 36.

SUBMISSION OF INSPECTION REPORT TO ADVERSE ATTORNEY

(No. 9971—Acting President, Board of Health—C. P. H.—March 23, 1939—2 pp.)

The Board of Health is under no legal duty, without an order of court, to submit to the attorney for the adverse party a copy of an inspection report relating to the sanitary conditions of a place of business charged with violation of the health ordinances.

Citations:

Statute: IRS '37, 110: 259.17.

Other reference: Municipal Court Rule 136.

PUBLICATION OF SYPHILIS DATA

(No. 10057—President, Board of Health—C. P. H.—July 21, 1939—2 pp.)

The Board of Health may not divulge information concerning persons infected with venereal disease, which is on record in its files, except upon the written consent of the patient.

Citations:

Statute: IRS '37, 111½: 22.

Ordinance: Code '31: 2208.

Other reference: Op. Corp. Coun. (1923), p. 691.

REPORTING CASES OF RHEUMATIC FEVER

(No. 10003—Acting President, Board of Health—W. V. S.—May 15, 1939—2 pp.)

Rheumatic fever, because of the heavy incidence and serious consequences of the disease in the City, falls within the commonly accepted meaning of the word "epidemic," and the Board of Health has the power to require that all cases of rheumatic fever occurring within the City be reported to the Board.

Citations:

Ordinance: Code '31: 2201.

Other reference: Webster's New International Dict. (1937).

D. OTHER DEPARTMENTS AND OFFICERS

COPYING ADDITIONS TO COPYRIGHTED MAP

(No. 9949—*Commissioner of Buildings—A. F. G.—January 27, 1939—3½ pp.*)

The City may be held liable for infringement of a copyright, if the Zoning Board of Appeals should copy the additions to the Sanborn map in the Department of Buildings, since the map and its additions are copyrighted by the publisher.

There would be no personal liability for any infringement on the part of the Commissioner of Buildings if the Zoning Board of Appeals should make copies of these additions to the Sanborn map in the Department of Buildings and use them to revise its own map accordingly, since the City purchased this map for public use.

Since the information from which these additions to the map are compiled is contained in public records, the Zoning Board of Appeals may employ persons to search the records, make drawings of the changes which its search discloses and enter its findings on its own copy of the map for its own use, without infringing the copyright.

Citation: *Chapman v. Ferry*, 18 Fed. 539 (1883).

OPINION OF FOREGOING SYNOPSIS

This will acknowledge your letter of January 13, 1939, in which you ask our advice in reference to a request from the Chairman of the Board of Appeals, Zoning, that you permit a certain part of his staff to make copies of the Sanborn map of Chicago, which is part of the working equipment of your office. You say:

"These maps in a number of volumes are protected by copyright and we have been warned by the publishers that while they may be referred to, any copies made of them will be an infringement on their copyright.

"The Department of Buildings and the Board of Appeals, Zoning, we understand, have each a copy of these maps. Those of the Department of Buildings are kept up to date by the Map Publisher's service which make a correction on the map whenever on any lot in the City, a building, shed or structure of any kind is erected, moved or taken down. This service costs the Department of Buildings some Eight hundred dollars (\$800.00) a year, and is a source of income to the map publishers.

"We understand that similar service to the maps of the Board of Appeals has been discontinued for some time but we further understand that the map publishers are in a position to bring these maps up to date without delay.

"Their proposition is to have me allow their force to copy data from our maps to bring them up to date, and further to permit subsequent corrections to be copied for their use, in keeping them up to date.

"This, under the circumstances, I cannot permit as I feel it will involve both the city and myself personally, in a question of infringement on the copyright, for it is obvious that the end result will be that only one service charge is being met for keeping up two sets of maps, contrary to their warning.

"Another matter and of great importance, is the handicap to the service of the Department that will result consequent to having any of our maps out of service, they have been so utilized as to make them now a very necessary part of our organization, they are continuously in service."

The Sanborn maps here in question consist of 40 volumes of maps of parts of the entire city of Chicago. They show on each lot in the city where improvements have been located, the size, shape, location and character of building or structure thereon erected. These maps have been copyrighted. The company keeps these maps up to date by correcting the maps whenever changes in the maps are made necessary by reason of the erection, removal or demolition of buildings or structures. We are informed that these additions to the maps also are copyrighted. You advise us that an annual fee of \$14.00 per volume is paid by you to the Sanborn Company for servicing the maps.

In order to make these corrections the company is required to search public records, make surveys and prepare drawings all of which entails expense. The company is entitled to the fruits of its labor. The city of Chicago purchased these revised maps for public purposes and we believe that the Board of Appeals, Zoning, or any city department, or the public has the right to examine and consult these maps. If the Board of Appeals should make copies of these additions and use them to revise their own maps accordingly, there would be no personal liability on your part for any infringement.

As the information from which additions to the maps are compiled are contained in public records we are of the opinion the Board of Appeals, Zoning, could employ persons to search the records, make drawings of the changes in buildings which this search disclosed and enter their findings on their own map for their own use without infringing the copyright. But if the Board of Appeals should make copies of these additions from your maps the city may be held liable for infringement. In discussing this matter the United States District Court of Oregon said:

"Questions of infringement of copyright are often very difficult to decide. The distinctions between the lawful and unlawful use of a prior publication are sometimes very fine and almost inappreciable. * * * A person who bestows his skill and time in the surveys, research, and observation necessary to the making of a correct map of any other place or locality, does not thereby prevent any other person from using the same means to accomplish the same end. The natural objects, public records, and surveys from which a map is made are open to the examination of any one. But it is clear that no person has a right to sit down and copy the map of another, and thereby defraud the latter of the profit of his labor and skill." *Chapman v. Ferry*, 18 Fed. 539, 541.

Aside from the question of infringing a copyright, the reason you give in the next to last paragraph of your letter viz.: the demoralization of service in your office which would result from compliance with the request of the Board of Appeals is one of convenience and policy of which you alone can be the judge in determining whether you are justified in refusing to comply with the request.

CORPORATION COUNSEL AS LEGAL REPRESENTATIVE

(No. 10113—*Committee on Finance—N. N. E.—October 5, 1939—2 pp.*)

The Corporation Counsel appears for and protects the interests of the City in all actions, suits and proceedings brought by or against the City, and all assistants for special work must be members of the Law Department and appointed by the Corporation Counsel.

Citations:

Statutes: Ill. Laws (1863), p. 50.
IRS '37, 24: 176.

Ordinance: Code '31: 35.

Cases: People v. Faherty, 306 Ill. 119 (1923).
Baltzer v. City of Chicago, 260 Ill. App. 384 (1931).

DEFENSE OF CITY EMPLOYEE BY CORPORATION COUNSEL

(No. 9846—*Commissioner of Public Works—C. N.—June 21, 1938—2 pp.*)

The Corporation Counsel can appear as counsel for a City employee in a suit arising out of the employee's duties only if ordered to do so by the City Council.

Citation: IRS '37, 24: 176.

PERMIT FOR REMOVAL OF UNSAFE RAILROAD VIADUCT

(No. 9764—*Commissioner of Public Works—A. A. S.—January 27, 1938—1½ pp.*)

The Commissioner of Public Works has no power to issue a permit for the removal of an unsafe railroad viaduct, without prior authorization from the City Council.

PAYMENT OF MUNICIPAL COURT COSTS

(No. 10070—*Chief Justice of the Municipal Court of Chicago—J. F. G.—August 4, 1939—3 pp.*)

The Municipal Court of Chicago is the judicial branch of the City government. It is not a corporation or a governing body separate and independent of the City so as to require a transfer of corporate funds of the City to cancel charges for costs in the Municipal Court incurred in the prosecution of City cases.

However, the Chicago Housing Authority is a separate and inde-

pendent municipal corporation and is liable for the costs of instituting suit in the Municipal Court of Chicago.

Citations:

Constitution: Illinois, art. IV, sec. 34.

Case: People v. City of Chicago, 310 Ill. 534 (1923).

INCARCERATION IN HOUSE OF CORRECTION FOR MORE THAN SIX MONTHS

(No. 10002—*Superintendent, House of Correction—C. P. H.—May 10, 1939—3 pp.*)

Where a person has been committed to the House of Correction for the satisfaction of fines and costs imposed for sixteen separate and distinct offenses, neither one of which exceeds six months, a person may be incarcerated for as long a time as is necessary to satisfy all the fines and costs imposed when the mittimus in each case provides that the time for satisfying the fines and costs shall be served consecutively.

Citations:

Statute: IRS '37, 24: 80.

Ordinances: Code '31: 615, 620.

Coun. J. (1931-32), p. 980.

ENFORCEMENT OF INDUSTRIAL COMMISSION RULES FOR VENTILATION AND SMOKE REMOVAL

(No. 9929—*Advisory Committee on the Building Code—A. F. G.—December 12, 1938—3 pp.*)

A proposed amendment to the Building ordinance which will divest the Division of Heating, Ventilation and Industrial Sanitation of the duty to enforce the rules of the Industrial Commission for industrial ventilation and systems for the removal of dust, smoke and gas, is in harmony with statutes relating to the matter. The intention of the Health and Safety act is to place the enforcement of these rules solely in the hands of the State Department of Labor.

Citations:

Statutes: Health and Safety act, secs. 3, 4, 5, 17, 18.

Ill. Laws, 59th Gen. Ass., 3rd Sp. sess., p. 33.

Ordinances: Coun. J. (July 20, 1938), p. 6577 (Building ordinance, sec. A, 4701.10).

TERM OF PRESIDENT OF CIVIL SERVICE COMMISSION

(No. 9779—*Secretary, Civil Service Commission—J. F. G.—February 17, 1938—1½ pp.*)

By statute, the term of each Civil Service Commissioner is three

years and until his successor is appointed and qualified. Until a successor is appointed for a present Civil Service Commissioner he continues in his position, and may act as President of the Civil Service Commission subject to the will of the members of the Commission.

Whenever a successor to a hold-over office is appointed, the successor serves for that part of the current term which is unexpired and until his successor is appointed and qualified.

Citation: IRS '37, 24½: 39, 57.

PERSONAL LIABILITY OF CITY OFFICER FOR JUDGMENTS

(No. 9739—C. H. L.—January 3, 1938—1½ pp.)

A judgment for court costs against a person in his capacity as an officer of the City attaches no personal liability. It cannot be levied upon his personal property, nor does it become a lien upon any real property that he may own or thereafter acquire in his private, personal capacity.

CHAPTER II

RIGHTS AND DUTIES OF CITY EMPLOYEES

A. CIVIL SERVICE

SERVING NOTICE OF HEARING UPON A CIVIL SERVICE EMPLOYEE

(No. 10079—Civil Service Commission—F. V. M.—August 14, 1939—
6 pp.)

Service may be had upon a civil service employee for a Civil Service Commission hearing by depositing an envelope, properly addressed as shown by the records of the Commission in a United States mail box, at least five days before the hearing. The envelope should contain copies of the charges filed against him together with the notice of the time and place of the investigation of said charges.

If an employee is committed to the Psychopathic Hospital, he can be served there with a copy of the civil service charges and the notice of the time and place of the hearing and the commission can proceed then with the hearing the same as in other cases.

Citations:

Statute: ISBS '37, 24½: 12.

Cases: Maloney et al. v. Dewey et al., 127 Ill. 395 (1889).
Noel v. Modern Woodmen of America, 61 Ill. App. 597 (1895).
Pfeiffer v. Weishaupt, 13 Daly 161 (1885).
McKenna v. McArdle, 191 Mass. 96 (1906).
Johnson v. Pomeroy, 31 Ohio St. Rep. 247 (1877).
King v. Robinson, 33 Me. 114 (1851).

Other reference: Civil Service Commission, Rule VI, sec. 2.

OPINION OF FOREGOING SYNOPSIS

We are replying to your letter of June 22, 1939 in which you request an opinion pertaining to trial board cases where you cannot secure personal service on the employee against whom charges have been filed.

We quote from the Statute and your rules:

"Sec. 12. Excepting as hereinafter provided in this section, no officer or employe in the classified civil service of any city who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense. Such charges shall be investigated by or before said civil service commission, or by or before some officer or board appointed by said commission, to conduct such investigation. The finding and decision of such commission or investigating officer or board, when approved by said commission,

shall be certified to the appointing officer, and shall be forthwith enforced by such officer. * * *

ISBS (1937) Ch. 24½, p. 722.

Rule VI (Civil Service Commission).

"* * * Sec. 2. Hearings. The Commission shall cause copies of written charges filed with it against any officer or employe in the classified service, to be served personally upon the officer or employe against whom such charges are filed, or shall have the same mailed to his address as shown by the records of the Commission, notifying him of the time and place of investigation of said charges. No such investigation shall be held less than five days after the serving or mailing of notice."

Based on the foregoing section of the Civil Service law and in accordance with Section 2 of Rule VI, the deposit of an envelope containing copies of charges filed against an officer or employee, and notice of the time and place of the investigation of said charges, bearing the address of such individual as shown by the records of your Commission, in a United States mail box, is sufficient service to warrant the Commission proceeding with the hearing on the date set out in the notice, if said notice was mailed five days previous to the date of the hearing.

With reference to the two employees who were committed to the Psychopathic Hospital, we have the following to say:

In the case of *Maloney et al. v. Dewey et al.*, 127 Ill. 395, 403, the court said:

"* * * After inquisition, and the appointment of a conservator for a lunatic, a party filing a bill to enforce the contracts of such lunatic should make the conservator a party. But until inquisition and the appointment of a conservator, it is competent to commence suit against the lunatic. The complainant is not bound to ascertain the mental capacity of the defendant, and have a conservator appointed, before he can bring suit. *King v. Robinson*, 33 Me. 114."

In the case of *Noel v. Modern Woodmen of America*, 61 Ill. App. 597, 600, 601, in which was involved the question of expulsion of plaintiff's husband from the local camp of the Modern Woodmen of America, the court said (p. 600):

"* * * The proceeding which resulted in the expulsion was quasi judicial in its character, and if the local camp, which under the by-laws of the order constituted the court, had acquired jurisdiction, its judgment pronounced in good faith was binding. The rule is that jurisdiction of an insane person may be obtained in the same manner as if he were sane, and a judgment against such a person can not be impeached in any collateral action. Unless set aside by a direct proceeding for that purpose, such a judgment is of undoubted validity. *Maloney v. Dewey*, 127 Ill. 395; 1 Black on Judgments, Sec. 205; Freeman on Judgments, Sec. 123; 1 Beach on Private Corporations, Sec. 83; *Pfeiffer v. Weishaupt*, 13 Daly 161.

"The plea which the replication of insanity professed to answer averred service of notice upon the member that charges had been brought against him, together with a copy of the same, and that he should appear at a regular meeting of the camp at a specified time and place, where he might be present if he desired, with witnesses or documents necessary for his defense. In the case of *United Workmen v. Zuhlke*, 129 Ill. 298, relied on in support of the replication, there was no service of notice or process on the member, but the judgment

of expulsion rested on his entry of appearance and admission of facts. * * *

and (p. 601):

"* * * The records of the local camp, of which plaintiff's husband was a member, were offered in evidence, and they showed a compliance with the by-laws of the order in the proceedings had. The trial was held at the hall of the camp December 27, 1892, and the record showed that the "escort" testified at the trial that he delivered a copy of the charges to the accused, December 15, 1892, and at the same time notified him to appear at the time and place for trial, naming them, but this evidence of service being objected to, the notice and copy of charges were produced, and the time and manner of service by copies on the accused were proven by oral testimony. It is urged that this proof was incompetent, and that the service should have been proved by a return indorsed on the notice and copy of charges. We know of no statute or rule of law that would make such a return evidence of service, and no by-law is shown which could have that effect. We do not doubt that the oral evidence was admissible. * * *

In the case of *Pfeiffer v. Weishaupt*, 13 Daly 161, 163, the court said:

"* * * The only specific objection taken to proof of the proceedings was to the service by mail instead of personally of the committee's report. It appears, however, by reference to the constitutions, that where the expulsion is for failure to appear and answer charges, service of the report is not required. Such service is provided for only in cases where a trial on charges has been had, and is intended to limit the time within which an appeal may be taken.

"The whole contention in the trial was as to whether the alleged insanity of the accused at the time the charges were preferred against him was an answer to the defense founded upon his expulsion for neglecting to appear and answer such charges. It is claimed that Pfeiffer, being apparently and actually of unsound mind, could not be duly summoned or convicted of neglect to appear, and punished by expulsion and the loss of all rights in the society. There is no force in this point. A person who has even been adjudged a lunatic, and of whom a committee both of person and estate has been appointed, may be sued at law and the judgment recovered against him is not void (*Sternberg v. Schoolcraft*, 2 Barb. 153). It would be a contempt of the court which appointed the committee to sue without leave, but the judgment is valid. (See authorities cited in report of above case.) There was no reason why the lodge should not proceed against a person not adjudged a lunatic. He could have been defended and his rights protected. If they were not, the lodge might regularly proceed according to its laws. His alleged insanity did not excuse his failure to appear (*Hellenberg v. District No. 1 Etc.*, 94 N. Y. 580).

"The judgment should be affirmed, with costs to respondents."

In the case of *McKenna v. McArdle*, 191 Mass. 96, 99, the court said:

"* * * In ordinary suits against minors and insane persons, service is made in the usual way upon the minor or insane person, and that is the only service required. *Taylor v. Lovering*, 171 Mass. 303."

In the case of *Johnson v. Pomeroy*, 31 Ohio St. Rep. 247, 248, the court said:

"1. An insane person may be sued and jurisdiction over his person acquired by the like process as if he were sane. * * *"

In the case of *King v. Robinson*, 33 Me. 114, 123, the court said:

"The law does not appear to have imposed it as a duty to be performed by a plaintiff, to ascertain the mental capacity of a defendant and to bring it before the Court for its consideration, that such a guardian may be appointed. It may be prudent in cases of doubt for him to do so, lest his judgment should be liable to be disturbed by a petition for a review, or possibly by a suit in equity."

From the foregoing we are of the opinion that the employees who are committed to the Psychopathic Hospital can be served there with copies of charges and notices of the time and place of the hearing, and the Commission may proceed with the hearing thereon the same as in other cases.

ELIGIBILITY OF CIVIL SERVICE EMPLOYEE ON LEAVE TO AUTOMATIC SALARY INCREASE

(No. 9787—*City Comptroller—F. V. M.—February 25, 1938—2½ pp.*)

The Civil Service Commission has exclusive authority to determine if and when a civil service employee shall be advanced from a lower to a higher salary group. A person who was on a leave of absence at the time he would have been eligible for an automatic salary increase is not eligible for that increase because he was not "actually employed" at that time.

Citations:

Ordinances: Code '31: 671, 672.

Other reference: Civil Service Commission rules, sec. 6.

COMPENSATION FOR LOSS OF VACATION, UNUSED SICK LEAVE AND OVERTIME

(No. 9910—*Chairman, Committee on Finance—F. V. M.—November 17, 1938—5 pp.*)

Certain City employees who have been laid off and who have been in the employment of the City at least one year prior to their lay-off are entitled to compensation for the vacation period of the year in which they are laid off. Vacations are earned by previous services rather than by the possibility of future ones.

Such employees are not entitled to compensation for unused sick leave, as leave of absence can be granted only on account of sickness or other cause for absence which may be considered by the department head as a sufficient and legitimate excuse for the employee's failure to be present, and only during the period that the cause existed.

Such employees cannot recover any compensation for overtime, as employees who are employed by the month and whose salary is appropriated for are not entitled to anything extra for overtime.

Citations:

Statute: USCA, title 5, sec. 30.

Cases: Commissioner of Labor and Industries v. Downey, 195 NE 742 (Mass. 1935).

De Weerd v. City of Springfield, 4 NE (2nd) 313 (Mass. 1936).

Other references: Op. Corp. Coun. (1915-16), p. 189 (1897-1905), pp. 175, 768.

Op. Atty. Gen. of US, v. 20, p. 728 (1844).

Coun. J. (1937-38), p. 5109 (Order).

LACHES BARRING BACK SALARY CLAIM

(No. 9917—*Chairman, Committee on Finance—F. V. M.—November 28, 1938—2½ pp.*)

A person is barred by laches from now collecting back salary which he claims to be due him from work between August, 1928 and October, 1932.

ADDITIONAL RATING FOR NAVAL SERVICE DURING WAR

(No. 9909—*Alderman, 28th Ward—F. V. M.—November 17, 1938—2½ pp.*)

A person who served in the United States Navy during the world war and who attended drills and received pay from the United States Naval Reserve up to September 30, 1921, at which time he was discharged, is entitled to an additional rating of 6% on the list of police captains.

Citation: IRS '37, 24½: 49 (Civil Service act, sec. 10½).

LEAVE OF ABSENCE FOR MILITARY SERVICE

(No. 10046—*Commissioner of Subways and Traction—C. J. A.—July 10, 1939—2 pp.*)

All employees of the City, whether temporary or permanent, who are members of the Illinois National Guard, United States Naval Reserve force, Marine Corps Reserve, or Organized Reserve Corps, may be granted a leave of absence with pay for the periods that they serve during the year 1939.

Citation: Order of the City Council of February 6, 1939.

VACATION FOR EMPLOYEES ABSENT WITHOUT PAY MORE THAN THIRTY DAYS

(No. 9826—*City Architect*—F. V. M.—May 17, 1938—1½ pp.)

Employees who have been absent for more than thirty days without pay, but who have not been discharged, are entitled to two weeks vacation with pay, although a department head may combine an employee's vacation and sick-leave periods if long continued sickness of the employee warrants such a course.

Citation: Coun. J. (1937-38), p. 5109.

REFUND OF FINE TO CIVIL SERVICE EMPLOYEE

(No. 9767—*Chairman, Committee on Finance*—F. V. M.—January 31, 1938—1½ pp.)

A civil service employee who was fined on the recommendation of the Civil Service Commission is entitled to a refund of his fine, but not to a reimbursement for attorney's fees, when a court quashed the record of his trial by the Civil Service Commission. By reason of the quashing of that record, the employee reverted to the status he held before charges were filed against him, and his standing became the same as if the Commission had never recommended that he be fined.

ACCEPTANCE OF RESIGNATION

(No. 10090—*Commissioner of Police*—C. H. L.—August 30, 1939—2 pp.)

A resignation signed by a civil service employee as an alternative to having charges preferred against him before the Civil Service Commission is not a complete and operative resignation. Hence, if a civil service employee is charged with such violation that he should be removed from the department, the better practice is to proceed with a hearing before the Civil Service Commission rather than accept the resignation of said employee.

Citation: *People ex rel. O'Connor v. Harding*, 224 Ill. App. 198 (1922).

Opinion No. 10078 of August 11, 1939 to the President of the Board of Health holds substantially the same as the above opinion.

RESIGNATION OF MENTALLY INCOMPETENT EMPLOYEE

(No. 10039—*Commissioner of Police—F. V. M.—June 22, 1939—2 pp.*)

The resignation of a mentally incompetent employee signed by the conservatrix can be accepted, if an order of court is obtained authorizing the conservatrix to sign the resignation for and on behalf of said employee, as his annuity rights will then mature.

Citation: 19 Op. Corp. Coun. 402 (No. 9288).

**EXPUNGING RESIGNATION FROM RECORDS OF
CIVIL SERVICE COMMISSION**

(No. 9955—*Civil Service Commission—F. V. M.—February 6, 1939—1½ pp.*)

The resignation of a former employee of the Board of Health may not be expunged from the records of the Civil Service Commission when the application for such cancellation was not made within thirty days from the time of filing the resignation as required by the rules of the Civil Service Commission.

Citation: Civil Service Commission rules, rule IX, sec. 2.

**SICK BENEFIT TO TEMPORARY EMPLOYEE
AFTER RESIGNATION**

(No. 10045—*City Physician—F. V. M.—July 5, 1939—2 pp.*)

A sixty-day City employee who, at the time that he resigned, was in apparently good health is not entitled to two weeks' sick benefit with pay if he thereafter becomes sick.

Citation: Order of the City Council, January 4, 1939.

B. SALARIES**RESTORATION OF 1931 SALARY DEDUCTIONS**

(No. 10051—*Secretary, Board of Directors, Municipal Tuberculosis Institute—J. F. G.—July 14, 1939—4 pp.*)

If the board of directors of the Municipal Tuberculosis Sanitarium has funds available for such purpose, it has power and authority to pay its employees the two weeks' salary deducted from the payrolls in 1931.

Citations:

Statutes: IRS '37, 24: 467.

Cities and Villages act, art. VII, sec. 4.

Other reference: 19 Op. Corp. Coun. 409 (No. 9245).

**OBTAINING FUNDS FOR SALARIES OF ILLEGALLY
RETIRED EMPLOYEES**

(No. 9895—*City Comptroller—J. F. G.—October 3, 1938—2½ pp.*)

In order to comply with a writ of mandamus ordering the payment of the salaries of certain illegally retired policemen and firemen the City Council may authorize the City Comptroller and the City Treasurer to loan or advance the necessary amount to pay the salaries from any funds of the City not immediately necessary for the purposes for which they were appropriated, and provide in the annual appropriation bill for 1939 a sufficient amount in the appropriations for salaries to reimburse the funds from which the temporary loans were made.

Citations:

Statutes: IRS '37, 24: 102 and 103.

Cities and Villages act, art. VII, sec. 2a, 3.

LIABILITY FOR EMPLOYEE'S SALARY NOT APPROPRIATED

(No. 9833—*Chairman, Committee on Finance—W. V. S.—May 24, 1938—2 pp.*)

The City is not liable to the widow of a City employee or to his estate for salary for a period of time during which the employee was laid off and his position abolished by failure of the City Council to appropriate for it. The City Council has power to control the organization of the various departments of the City and to consolidate or simplify the organization of those departments in such a manner as to eliminate unnecessary employees.

Citation: *McArdle v. Chicago*, 280 Ill. App. 621 (1935).

**PAYMENT OF BOARD OF LOCAL IMPROVEMENT
EMPLOYEES FOR WORK ON DEPARTMENT
OF STREETS AND ELECTRICITY
WPA PROJECT**

(No. 9912—*Acting Commissioner of Streets and Electricity—J. F. G.—November 18, 1938—2 pp.*)

The Acting Commissioner of Streets and Electricity may pay the salaries of paving inspectors of the Board of Local Improvements engaged in the inspection of WPA work on street improvements and repair under the direction of the Acting Commissioner of Streets and Electricity out of any vehicle tax funds appropriated to his department for carrying on the works of the projects on which said paving inspectors are employed.

Citations:

Statutes: IRS '37, 24: 102.

Cities and Villages act, art. VII, sec. 2a.

ASSIGNMENT OF WAGES

(No. 9884—*City Comptroller—E. R. D.—September 14, 1938—1½ pp.*)

An assignment of wages by an employee of the City should be disregarded by the Comptroller as against public policy.

Citations:

Case: *Lamb v. Lamb*, 256 Ill. App. 226 (1930).

Other reference: 18 Op. Corp. Coun. 159 (No. 8886).

MUNICIPAL EMPLOYEE INDEBTED TO A TAX RECEIVER

(No. 10063—*Superintendent of Streets—N. N. E.—July 26, 1939—2 pp.*)

The City cannot be compelled to pay over the salary of one of its employees to a receiver on a claim for unpaid rent even though the County Treasurer is acting as tax receiver on the premises rented.

Citations:

Case: *Lamb v. Lamb*, 256 Ill. App. 226 (1930).

Other reference: 19 Op. Corp. Coun. 413 (No. 9566).

CLAIM ON SPECIAL EMPLOYMENT

(No. 10150—*Committee on Finance—W. J. L.—November 28, 1939—2 pp.*)

When an appraiser was not legally employed by the City to appraise the amount of damage in a personal property damage case as alleged, the City is not liable for the services allegedly rendered.

C. WORKMEN'S COMPENSATION

WORKMEN'S COMPENSATION INSURANCE IN CONTRACT FOR SUPPLIES

(No. 10166—*Commissioner of Public Works—M. H. F.—December 27, 1939—5 pp.*)

Where the City purchases material or supplies which are to be manufactured, mined or produced on the special order of the City and are not to be furnished out of the regular stock in trade of the contractor, the contract should require the contractor to insure his employees against accidental injuries or death suffered by any of his employees and for which they would be entitled to awards under the Workmen's Compensation act and the Workmen's Occupational Diseases act.

Where supplies are contracted for, the relationship between the City and the contractor is that of vendor and vendee, and not that of employer and employee. Therefore, in such case the provision relating to the Workmen's Compensation act and the Workmen's Occupational Diseases act would be unnecessary.

Citations:

Statute: IRS '39, 48: 168.

Ordinance: Mun. Code: 26-24.

OPINION OF FOREGOING SYNOPSIS

Your communication of December 12, 1939 invites our attention to the forms of contract now in use by your department for work contracts and also supplies contracts. With particular reference to the requirements of two acts of the General Assembly of the State of Illinois, namely, the Workmen's Compensation Act and the Workmen's Occupational Diseases Act, you request our opinion as to whether your form of contract for supplies should be changed so as to include a reference to both of these acts similar to the reference which is now a part of your form of work contract.

Section 26-24 of the Municipal Code of Chicago is the section of the Code which is controlling upon the matter so far as the Workmen's Compensation Act is concerned. This section reads as follows:

"In all contracts requiring the employment of workmen or laborers the contractor shall be required to insure to his employes or their beneficiaries the compensation provided for in the act of the general assembly of the state entitled, 'An Act to promote the general welfare of the people of this state by providing compensation for accidental injuries or death suffered in the course of employment within this state, and without this state where the contract of employment is made within this state, providing for the enforcement and administering thereof, and a penalty for its violation and repealing an act entitled, 'An Act to promote the general welfare of the people of this state by providing compensation for accidental injuries or death suffered in the course of employment,' approved June 10, 1911, in force May 1, 1912,' approved June 28, 1913, in force July 1, 1913. Said contractor shall also be required to agree to indemnify, keep and save harmless the city from all claims, judgments, awards and costs which may in anywise come against said city by reason of any accidental injuries or death suffered by any of his employes in and about the performance of his contract; provided, that when such contract is for the furnishing of materials or supplies which are not manufactured, mined or produced on the special order of the city, but are to be furnished to the city out of the regular stock-in-trade of the contractor, the head of the department so ordering such materials or supplies may, in his discretion, waive the insurance of the employes of such contractor in case a bond is given to the city conditioned that the contractor will pay all claims and demands which may arise or accrue against the city as a result of the accidental injury or death of any of such contractor's employes."

The necessity for the code provision and compliance with its terms is found in section 31 of the Workmen's Compensation Act, (Par. 168, Chap. 48, Illinois Revised Statutes, 1939). It states in substance that anyone engaging in any of the businesses or enterprises referred to in the act, who undertakes to do any work enumerated therein, shall be liable to pay compensation to his own immediate employes in accordance

with the provisions of the act, and in addition thereto if he directly or indirectly engages any contractor whether principal or sub-contractor to do any such work, he shall be liable to pay compensation to the employees of any such contractor or sub-contractor, unless such contractor or sub-contractor shall have insured, in any company or association authorized under the laws of this State to insure the liability to pay compensation under the act, or guaranteed his liability to pay such compensation.

It will therefore be seen that when the city engages any contractor to do work for it, the city may become liable to pay compensation to employees of such contractor, unless such contractor is insured or his liability guaranteed.

It should be noted that section 26-24 of the code authorizes the waiver by you of insurance only in those cases where the contracts are for the furnishing of materials or supplies which are not manufactured, mined or produced on the special order of the city, but are to be furnished to the city out of the regular stock-in-trade of the contractor. Where the city purchases materials or supplies which are to be manufactured, mined or produced on the special order of the city, and are not to be furnished out of the regular stock-in-trade of the contractor, the provision relating to the Workmen's Compensation Act should be included.

With reference to the Workmen's Occupational Diseases Act, the provision concerning it in the city's printed form for contract for work was inserted because of the possibility that the city might be held liable under the terms of that act in case its contractors did not insure to their employees and beneficiaries the compensation provided for in the act and because of the provision in the ordinance then in force requiring indemnification against accidental injuries or death suffered by any of the employees of contractors. Our opinion, therefore, was and still is that the provision in the contract, requiring contractors to insure to their employees and beneficiaries the compensation, is proper.

Regarding your specific inquiry as to why provisions relating to the above mentioned acts have not been incorporated into the printed form of contract for supplies, we assume the reason to be that their incorporation was considered unnecessary. As we view the matter, we see no likelihood of the city being held liable under the provisions of either of these two acts, when it merely contracts for the furnishing of materials and supplies out of the regular stock-in-trade of contractors. In such cases the relationship between any particular contractor and the city would be that of vendor and vendee and not that of employee and employer. It is therefore our opinion that the printed form of contract for supplies now in use is sufficient for all cases, except where materials or supplies are manufactured, mined or produced on the special order of the city. In such cases, the work contract form might be used or the supplies form modified by incorporating the discussed provisions.

CLAIM FOR MEDICAL EXPENSE UNDER WORKMEN'S COMPENSATION ACT

*(No. 10007—Chairman, Committee on Finance—C. N.—May 17, 1939
—2 pp.)*

The City is not liable under the Workmen's Compensation act for medical expenses, where it offered to provide medical attention which was refused by the injured party and the employee made no request for medical expense at the time he received a compensation award.

EFFECTIVE DATE OF WORKMEN'S COMPENSATION AMENDMENT

(No. 10158—*Committee on Finance—C. N.—December 13, 1939—*
3½ pp.)

Although the bill increasing the awards under the Workmen's Compensation act was passed before July 1, 1939, it was not signed until July 24th and therefore did not become effective until July 24th. Where an employee was injured on July 19th, the award should be made pursuant to the statute before the amendment in question.

Citations:

Constitution: Illinois (1870), art. IV, sec. 13.

Case: Board of Education of School Dist. No. 41 v. Morgan, 316 Ill. 143 (1925).

WORKMEN'S COMPENSATION FOR RELIEF WORKERS

(No. 10058—*Supervisor, Bureau of Workmen's Compensation—C. N.—*
July 24, 1939—2 pp.)

Men on relief working for the Department of Public Works, irrespective of what salaries may be allotted to them or the time actually devoted to work, come under the provisions of the Workmen's Compensation act because they are under control of the City and the City engages in some of the extra-hazardous enterprises enumerated in the act.

Hence if relief clients are injured in the course of their employment for the Department of Public Works, which controls and directs the relief clients, the City would be liable under the act for any injuries sustained.

Citation: Forest Preserve District of Cook County v. Industrial Commission, 357 Ill. 389 (1934).

COMPENSATION FOR ACCIDENTAL SHOOTING

(No. 10092—*Chairman, Committee on Finance—T. A. M.—August 31, 1939—3 pp.*)

The City is liable under the Workmen's Compensation act to an employee shot accidentally by a policeman attempting to prevent the theft of some City property, as the injury occurred at a time and place when said employee was performing his usual duties and thus arose out of and in the cause of his employment.

Citations:

Cases: Board of Education v. Industrial Commission, 321 Ill. 23 (1923).

Herald Printing & Stationery Co. v. Industrial Commission, 345 Ill. 25 (1931).

Irwin-Neisler & Co. v. Industrial Commission, 346 Ill. 89 (1931).

Vincennes Bridge Co. v. Industrial Commission, 351 Ill. 444 (1933).

CHAPTER III

ANNUITIES AND BENEFITS FOR CITY EMPLOYEES

A. MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND

MEMBERSHIP OF CIVIL SERVICE COMMISSIONER IN MUNICIPAL FUND

(No. 10024—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—June 6, 1939—2 pp.*)

Each Civil Service Commissioner of the City is entitled to membership in the Municipal Employees' Annuity and Benefit fund as contributor to and beneficiary thereof.

Citations: IRS '37, 24: 1044, 1055; 24½: 39 et seq.

SALARY COMPUTED FOR PURPOSE OF BENEFIT DEDUCTIONS AND DISABILITY BENEFITS

(No. 10031—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—June 13, 1939—4 pp.*)

A nurse in the Contagious Disease Hospital who is receiving a stipulated sum of money as salary, plus an allowance of a special sum per month for maintenance at the hospital is receiving a salary of the combined sums for purposes of deductions for disability benefits and granting of disability benefits under the Municipal Employees' Annuity and Benefit fund.

Citation: IRS '37, 24: 1090.

OPINION OF FOREGOING SYNOPSIS

Replying to your request for an opinion in the matter of Sarah M. Reid, the following is submitted:

Your letter states that Sarah M. Reid, hospital nurse employed by the Board of Health, Contagious Disease Hospital, City of Chicago, has applied for ordinary disability benefits from your Fund; that the annual appropriation bill of the City of Chicago for the year 1939 sets up the salaries for hospital nurse at \$105.00 per month, and further provides for maintenance to be received by said employee only in the form of maintenance at the hospital; that since the passage of the said appropriation ordinance, deductions from the salary of Sarah M. Reid for all purposes of your Fund have been made on the assumption that her salary was \$1260.00 a year, plus \$540.00 a year additional, or a total salary of \$1800.00; and that you desire an opinion advising you (1) whether or not deductions have been properly made from the salary of Sarah M. Reid on the basis of \$1800.00 a year, and (2) whether or not disability benefits shall be computed on the basis of a salary of \$1800.00 a year or on a salary of \$1260.00 a year.

Section 47 of the Act governing your Fund (Ill. Rev. Stat. 1937, Page 24, Sec. 1090) provides for the payment of ordinary disability benefits and specifies that the estimated amount required by your Board as necessary to provide ordinary disability benefits during a year shall be contributed as follows: One-half to be paid by the City and one-half to be prorated among all the municipal employees in proportion to the annual salary of each such municipal employee, the contribution of each individual employee to be prorated and deducted from each payment of salary.

"Salary" is defined in your Act as follows:

"'Salary': Annual Salary: provided, that three thousand dollars (\$3,000.00) shall be the maximum amount of the annual salary of any municipal employee which shall be considered for any purpose under this Act. Any amount of annual salary in excess of said amount of three thousand dollars (\$3,000.00) which any municipal employee shall receive shall not be considered to be 'Salary' for any purpose under this Act."

In the annual appropriation bill of the City of Chicago for the year 1939, passed by the City Council January 19, 1939, the appropriation for the Municipal Contagious Disease Hospital section contains an item (Page 53) as follows:

"Hospital Nurse—432 months at \$105.00 per month (A)." The designation "(A)" is explained in the legend on page 52 of the appropriation bill as being an indication of the class of employees allowed maintenance at the rate of \$45.00 per month, "to be received by said employees only in the form of maintenance at the Municipal Contagious Disease Hospital and not otherwise."

The provision just quoted, to the effect that this additional \$45.00 a month is to be received only in the form of maintenance, is to be construed by you as meaning that the \$45.00 per month was additional salary paid not in cash, but in maintenance, the purpose of that provision being to require the nurses to live at the hospital in the event they wanted the additional \$45.00 over and above the \$105.00 paid to them in cash. This additional \$45.00 per month in maintenance is payable only to those who live on the premises and are consequently continuously available for service when needed.

"Salary" means "a stipulated recompense for services," and the stipulated recompense of Sarah M. Reid for her services was \$150.00 per month, of which \$45.00 was payable in maintenance at the hospital.

"Ordinary Disability" under your Act is in effect "health and accident insurance," and the deductions from salary for ordinary disability benefit purposes are in effect the premium which the employee pays for this insurance. The deduction made by you on the basis of a salary of \$1800.00 was correct, as that was the amount of her stipulated recompense.

In view of the above, I am of the opinion that ordinary disability benefits for Sarah M. Reid should be computed on the basis of a salary of \$1800.00 a year, since that was the amount of her stipulated recompense, and the amount upon which she paid into your Fund for these benefits.

ACTUAL COMPENSATION FOR ADDITIONAL ANNUITY PURPOSES OF EMPLOYEE PAID ON DAILY BASIS

(No. 9816—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—April 21, 1938—2 pp.)

The actual compensation of an employee for additional annuity pur-

poses whose compensation is arranged on a daily basis should be computed as being 300 times the highest daily wage appropriated for the employee for service in any position which has been held by him.

Citation: IRS '37, 24: 1055, 1083, 1100.

ANNUITY TO FORMER WIFE VACATING DIVORCE AFTER EMPLOYEES' DEATH

(No. 9946—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—January 17, 1939—3 pp.*)

A widow's annuity should not be allowed to a municipal employee's former wife who, after the death of said employee, obtained a vacation of the divorce decree rendered 11 years before petition for vacation, as the 1935 amendments to the Municipal Employees' Annuity and Benefit Fund act require that a divorce decree must be filed within 5 years of the time of entry of the decree and within 1 year of the municipal employee's death.

Citations:

Statutes: IRS '37, 24: 1081 (Municipal Employees' Annuity and Benefit Fund act, sec. 38e).

III. Laws (1935), pp. 481, 498.

SERVICE AND FINANCIAL CREDITS UPON TRANSFER FROM FIREMEN'S FUND

(No. 10098—*Municipal Employees' Annuity and Benefit Fund—G. F. M.—September 14, 1939—3½ pp.*)

An employee who was eligible for the Firemen's Pension fund prior to 1922, resigned from the fire service on January 11, 1927 and was then certified in the municipal service on April 13, 1927, is entitled to prior service credit in the Municipal Employees' Annuity and Benefit Fund for services rendered in the Fire Department prior to January 1, 1922, and also to age and service credit for the period from January 1, 1922 until January 11, 1927 for his service in the Fire Department. However, such employee is entitled only to the following financial credits, (1) his accumulation for prior service annuity purposes, (2) the deductions made from his salary and paid into the "Municipal Employees' Annuity and Benefit Fund" after he became a contributor to that fund, (3) the City's contributions made concurrently with the deductions from salary, and (4) interest at 4% on these several items.

Citations:

Statutes: IRS '37, 24: 931, 1057, 1080, 1085.

Other reference: 18 Op. Corp. Coun. 255 (No. 6710).

OPINION OF FOREGOING SYNOPSIS

Replying to your request for advice as to the rights of a fireman who becomes a member of your Fund, the following is submitted:

Your letter states that one John M. Courtney died on August 15, 1939; that he was a former engineer-custodian for the Board of Education, City of Chicago; that your records indicate that he was certified as an assistant fire engineer in the fire department of the City of Chicago on October 16, 1919; that he resigned from the service of the fire department on January 11, 1927; that he was certified as engineer-custodian on April 13, 1927; and that he served in the latter capacity until his death.

Your inquiry is as to whether Mr. Courtney was entitled to service credits and to any money accumulations for service which he rendered as a member of the fire department.

Section 42 of the Act governing your Fund (Ill. Rev. Stats. 1937, Chap. 24, Sec. 1085) is the section of the Act which controls in this case. A similar question arose in 1930 in the case of one Michael P. Terry, who also came into your Fund from the Firemen's Pension Fund and became an engineer-custodian for the Board of Education of the City of Chicago, and an opinion was written in the latter case on July 9, 1930, and will be found reported on Page 255 of Volume 18 of the Opinions of the Corporation Counsel and Assistants, to which reference is respectfully made.

Under the provisions of Section 42 of the Act governing your Fund, Mr. Courtney, having joined the fire department prior to January 1, 1922, was entitled to become classified as a "present employee" when he joined your Fund in 1927. As such "present employee" his service in the fire department is to be counted as if such service were rendered as a municipal employee, and he is entitled to prior service credit for service rendered in the fire department prior to January 1, 1922, and is further entitled to age and service credit for the period from January 11, 1922, until January 11, 1927, for his service rendered in the fire department. He is also entitled to credit for service rendered as an engineer-custodian from April 13, 1927, until the date of his death.

No moneys are contributable into your Fund for the period of service rendered by Mr. Courtney in the fire department, since your Act does not contain any provision permitting contributions to be made in cases of this character, nor does your Act give to your Board the power to accept such contributions; neither did the Firemen's Pension Fund Act of 1917 (Ill. Rev. Stats., Ch. 24, Sec. 931), which was in force in the City of Chicago prior to July 1, 1931, contain any provision for a transfer of firemen's contributions from that Fund when a fireman became a member of any other pension fund or of an annuity and benefit fund.

The provision in Section 42, to the effect that any salary received by any municipal employee for his service in the fire department should be treated, for the purposes of your Act, in the same manner as though such salary were received for the performance of duty as a municipal employee, was a provision inserted in your Act to enable your Board to compute the prior service annuity accumulation for such fireman under Section 14 of your Act (Ill. Rev. Stats. 1937, Chap. 24, Sec. 1057); also, in order that such salary might be available for use in computing the amount of the maximum annuity payable to an employee and the wife of an employee under Section 37 of your Act (Ill. Rev. Stats. 1937, Ch. 24, Sec. 1080), which latter section provides that annuity for an employee shall not exceed 60% of the "highest salary" considered for annuity purposes under your Act, which shall have been received by the employee concerned, and further provides that compensation annuity to the widow shall not exceed 60% of such "highest salary," nor shall the annuity to a widow exceed 50% of such "highest salary," where the employee's death did not result from injury incurred in the performance of an act or acts of duty.

It will be seen that in the event any salary received by a member of

the fire department prior to his becoming a member of your Fund, for his service in the fire department, was higher than the salary received by him as a municipal employee, it would be to the advantage of such fireman that the salary paid to him as a member of the fire department should be considered by your Board as though it were salary earned as a municipal employee.

Section 42 of your Act was amended in 1931, but such amendment has reference solely to municipal employees working under temporary appointment, and consequently has no bearing upon the question here involved.

Under the provisions of your Act, it is apparent that the only financial credits to which Mr. Courtney was entitled, were his accumulation for prior service annuity purposes, the deductions made from his salary and paid into your Fund after he became a contributor to your Fund, the City's contributions made concurrently with the deductions from salary, and interest at 4% on these several items.

PENSIONER ACCEPTING CITY SALARY

(No. 9876—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—August 22, 1938—3½ pp.)

A pensioner of the City, who reentered the services of the City as a non-civil service appointee, is not entitled to be paid his pension for any of the time he was so employed by the City, since such pensioner is prohibited from claiming his pension by an order of the City Council.

The provisions of the order relative to the signing of a waiver and action by the head of the department employing the pensioner are solely for the purpose of advising the pension board concerned and are not necessary to carry into effect the order of the City Council.

Citations:

Cases: Kelly v. Retirement Board, 292 Ill. App. 390 (1937).

People ex rel. Luthardt v. Retirement Board, 273 Ill. App. 387 (1934).

Other references: Coun. J. June 10, 1931 (Order).
67 CJ 305.

PAYMENT OF COSTS FOR EXAMINING THE FIREMEN'S ANNUITY AND BENEFIT FUND

(No. 10030—Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—June 12, 1939—2 pp.)

The costs of examining the Firemen's Annuity and Benefit fund by the State Department of Insurance should be paid out of the fund as provided by statute.

Citations:

Statutes: IRS '37, 24: 944.64, 127: 56 (5).
Ill. Laws (1927), p. 557, sec. 5.

AGE CORRECTION

(No. 9837—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—May 20, 1938—1½ pp.*)

The age of a fireman stated in his application for appointment to the Fire Department is conclusive for annuity purposes. If it is erroneous, there is no statutory provision for correcting it.

Citation: IRS '37, 24: 944.60.

B. FIREMEN'S ANNUITY AND BENEFIT FUND**SERVICE CREDIT FOR PERSON IN FIRE SERVICE**

(No. 9748—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—January 13, 1938—2 pp.*)

A person holding a position which has been classified as in the fire service by the Civil Service Commission is entitled to a service credit in the Firemen's Annuity and Benefit Fund from the date the position was so classified to the present time, excepting any period he was out of the service and any period for which he received salary but has not paid the proper contributions into the Firemen's Annuity and Benefit Fund.

Citations:

Statute: IRS '37, 24: 943.

Other references: 18 Op. Corp. Coun. 321 (No. 7285), 322 (No. 7279), 324 (No. 7246).

OPINION OF FOREGOING SYNOPSIS

Replying to your request for an opinion as to what constitutes the term of service of Berkey E. Cover, Sr., for purposes of your fund, the following is submitted:

The records of the actuary's office show that Mr. Cover entered the city's service on December 21, 1904, as a lineman; on September 1, 1905, he was appointed fire alarm and police repairer; in February, 1911, he was appointed telegraph repairer; on July 16, 1927, he was appointed junior fire alarm operator; on September 28, 1927, he was appointed telegraph repairer; and that his rank on July 1, 1931, was that of telegraph repairer.

Section 13 of the firemen's pension fund act of 1917 (Ill. Rev. Stat. 1937, Ch. 24, Sec. 943) provided that all persons appointed to a position classified by the civil service commission as in the fire service came within the meaning of the word or term "fireman," and therefore became entitled to the benefits of that act.

The records of the civil service commission show that the position of telegraph repairer was first classified in the fire service on February 5,

1923, and as Mr. Cover was at that time occupying that position he became entitled to become a participant in the firemen's pension fund. The position of junior fire alarm operator was first classified in the fire service on May 13, 1921, consequently every position held by Mr. Cover since February 5, 1923, has been in the fire service. He would accordingly be entitled to a service credit in your fund beginning February 5, 1923, and continuing to the present time, excepting any time he was out of the service, subject to the provisions of section 51 of the act governing your fund, provided, that no credit shall be given him for any period of time during which he was in receipt of salary, unless the proper contributions for each period shall have been or shall be paid into your fund.

Your attention is respectfully invited to opinions heretofore submitted relative to similar cases, appearing in Volume 18 of the Published Opinions of the Corporation Counsel. (No. 7285 on page 321; No. 7279 on page 322; No. 7246 on page 324.)

The following opinions to the Retirement Board of the Firemen's Annuity and Benefit Fund holds substantially the same: Nos. 9749, 9750, 9751, 9752, 9753, January 12, 1938, 2 pp. each.

PRIOR SERVICE CREDIT FOR EMPLOYEES ON LEAVE OF ABSENCE OR VACATION WHEN ANNUITY AND BENEFIT FUND ACT BECAME EFFECTIVE

(No. 9804—*Retirement Board, Firemen's Annuity and Benefit Fund—
G. F. M.—April 7, 1938—2 pp.*)

Members of the Fire Department who were on leave of absence or on vacation on June 30, 1931, were present employees and should be credited for prior service as provided in the Firemen's Annuity and Benefit Fund act. Any person appointed to the Fire Department by the Civil Service Commission remains a member of that department until he resigns, is discharged, or dies.

Citation: IRS '37, 24: 944.12, 24½: 39.

OPINION OF FOREGOING SYNOPSIS

Replying to your request for an opinion in connection with the prior service credits of "present employees," the following is submitted:

So far as concerns the question presented here, section 12 of the act governing your fund defines a "present employee" as any fireman who shall be in the employment of the city as a fireman on June 30, 1931 (Ill. Rev. Stats. 1937, Chap. 24, sec. 944.12). Under the provisions of the act governing the civil service of cities (Ill. Rev. Stats. 1937, Chap. 24½, sec. 39) any person appointed to the fire department by the civil service commission remains a member of that department until he resigns, is discharged or dies. Consequently any member of the fire department who had not resigned, been discharged or died on or before June 30, 1931, was a fireman in the employment of the city on June 30, 1931 and came within the class of "present employee" as defined in your act. The fact that any fireman was on vacation or on leave of absence on June 30th or July 1, 1931, does not in any manner affect his civil service status as a member of the fire department nor his status as a "present

employee," if he became a fireman prior to July 1st, 1931, and was still a civil service member of the fire department on June 30th, 1931.

Section 51 of your act prescribes that in computing the term of service rendered by any fireman prior to July 1, 1931, there should be counted as periods of service for annuity purposes all periods of time during which such fireman performed the duties of his position, all periods of vacation, all periods of leave of absence with whole or part pay, all periods of leave of absence without pay which were necessary on account of disability, and all periods of leave of absence during which such fireman was engaged in the military or naval service of the United States of America.

I am of the opinion that members of the fire department who were on leave of absence or on vacation on June 30, 1931, should be credited with prior service as provided in section 51 of the act governing your fund.

ANNUITY PAYMENT FOR FRACTIONAL PART OF MONTH OF DEATH

*(No. 9907—Retirement Board, Firemen's Annuity and Benefit Fund—
G. F. M.—November 16, 1938—2 pp.)*

The estate of a member of the Fire Department who retired on an age and service annuity on March 12th and died on October 30th is entitled to have the first 12 days of October included in his annuity as the "monthly period" in his case was from the 13th of one month to the 12th of the succeeding month.

The "monthly period" referred to in section 15 of the Firemen's Annuity and Benefit Fund act in the provision, "No payment shall be made for any fractional part of the monthly period in which the annuitant shall die," does not mean the calendar month in which the person dies, but refers to the annuity payment month, which is measured from the date of the occurrence of the event upon which payment of such annuity depends.

Citation: IRS '37, 24: 944.15.

ANNUITY DEDUCTIONS FROM SALARY OF ILLEGALLY DISCHARGED FIREMEN

*(No. 9886—Retirement Board, Firemen's Annuity and Benefit Fund—
G. F. M.—September 14, 1938—4½ pp.)*

The amount of salary deductions for annuity purposes to be certified to the City Comptroller by the Retirement Board of the Firemen's Annuity and Benefit Fund for each fireman illegally retired should be the total amount of pension or annuity paid to him during any period of illegal compulsory retirement for which he now is to be paid his salary by the City. There should also be certified the amount of salary deductions properly chargeable to each such fireman, together

with interest on such deductions at the rate of 4% per annum from the date such salary deductions would have been paid into the Firemen's Annuity and Benefit Fund, had the fireman been receiving salary, up to the date such deductions are made from such salary and paid into the said Fund. Payment into the said Fund should be made by the City Comptroller within a reasonable time after such certification by the Retirement Board.

Citations:

Statute: IRS '37, 24: 944.17.

Case: Malloy v. Chicago, 369 Ill. 97 (1938).

OPINION OF FOREGOING SYNOPSIS

I am informed that the City Comptroller is desirous of being advised as to the amounts of money to be deducted from the salaries of firemen who were retired under the compulsory retirement act and which salaries are to be paid pursuant to the decision in the case of *Dennis Malloy, et al., v. City of Chicago* (1938), 369 Ill. 97.

The *Malloy* case involved the question of the right of persons retired under the compulsory retirement act to be paid their salaries for the period which elapsed between their retirement under the statutes and their retirement under the ordinance. There was also involved the question of re-payment into your fund of pensions paid to such firemen during the period referred to and the payment into your fund of deductions for annuity purposes from any salary which might be ordered paid to them. The original order in the case, as entered by Judge McGoorty, contained a provision that interest should be paid on salary deductions made in accordance with the firemen's annuity and benefit fund act, and also upon payments of pension made to the firemen concerned during the period of their said retirement. In ruling on the order relating to interest on pension payments, the Supreme Court held as follows:

"It would be unjust to allow such interest, even though, as here, the payments were purported to be made on another account, which a final adjudication shows was not owing and that the payments should be applied on the actual debt due the creditor."

The Supreme Court held that the allowance of interest on the annuity payments was an error and, for that and another error not necessary to be discussed here, reversed the judgment of the Superior Court and remanded the cause with directions to modify the judgment in accordance with the views expressed by the Supreme Court.

On July 12, 1938, upon motion of the attorneys for *Malloy, et al.*, the former judgment of the Superior Court was modified in accordance with the directions in the mandate of the Supreme Court, which had been previously filed in the Superior Court of Cook County. The modified order contains a provision for the payment of the claimed salary to certain of the persons concerned, and provides that before such salary shall be paid there shall first be deducted from such salary the amount of salary deductions representing such amounts as are to be paid into the annuity and benefit fund which would have been deducted from the salary of the fireman concerned had such fireman been paid such salary at the regular and customary pay periods during the time that such fireman was separated from his department in the city service by reason of compulsory retirement; the modified order also provides that there shall be deducted from the said salary of any fireman to whom any pension

or annuity has been paid during the period of such compulsory retirement the full amount of all pension or annuity paid to such fireman, and that these deductions shall be paid into the annuity and benefit fund from which the pension or annuity was paid.

There is no provision in the law empowering your board to charge interest on pension payments made to firemen under circumstances such as prevail in the *Malloy* case, and as the Supreme Court has said that it would be unjust to allow such interest to be charged, there should be certified to the City Comptroller the total amounts of pension or annuity paid the respective firemen concerned, without interest thereon.

All of the firemen concerned in the *Malloy* case are upwards of fifty-seven years of age, and Section 17 of the act governing your fund (Ill. Rev. Stats. 1937, Chap. 24, Sec. 944.17) requires that each such fireman shall pay interest upon his salary deductions for the period of time subsequent to the attainment of an age of fifty-seven years until such time as his total salary deductions, with interest thereon at the rate of four per cent per annum, so paid by him shall be equal to the sum which would have accumulated to his credit for age and service annuity purposes from sums deducted from his salary if deductions from his salary for such purposes at the rate stated in the act had been made during the entire period of his service until his attainment of an age of fifty-seven years, together with interest upon such sum, at the rate of four per cent per annum, for the period of time subsequent to his attainment of an age of fifty-seven years.

It will be noted that this is a statutory requirement which the courts cannot set aside. It will also be noted that the Supreme Court made no ruling on the question of charging interest on salary deductions, but only as to the charging of interest on annuity payments.

I am of the opinion that the amounts to be certified to the City Comptroller by your board as to each fireman, should be the total amount of pension or annuity paid to him during any period of illegal compulsory retirement for which he now is to be paid his salary by the City of Chicago. There should also be certified the amount of salary deductions properly chargeable to such fireman, together with interest on such deductions at the rate of four per cent per annum from the date such salary deductions would have been paid into your fund had such fireman been in receipt of a salary, up to the date such deductions are made from such salary and paid into your fund, it being assumed that payment into your fund will be made by the City Comptroller within a reasonable time after such certification by you.

I would recommend that a copy of this opinion be forwarded to the City Comptroller with your certification, for his information.

REPAYMENT OF WIDOW'S DEDUCTION UPON ANNUITANT'S REMARRIAGE

(No. 9906—*Retirement Board, Firemen's Annuity and Benefit Fund*—*G. F. M.*—November 16, 1938—2 pp.)

A fireman with rights retained from the Firemen's Pension Fund act of 1917 who received a refund of salary deductions for widow's benefits after the death of his first wife, and who subsequently remarried, and who was then granted an annuity, should repay the money refunded to him, together with interest thereon at the rate of 4% per

annum from the date of refund to the date of repayment. If not repaid, the amount should be charged to his account and bear interest until collected from him or his widow, by deduction from the monthly payment of annuity or otherwise.

The Firemen's Annuity and Benefit Fund act retains any rights that a fireman had under the Firemen's Pension Fund act of 1917. A widow's pension is provided under the act of 1917, with no conditions as to the date of her marriage to the fireman or his age at the time of marriage.

Citation: IRS '37, 24: 944.52.

REFUND OF WIDOW'S DEDUCTIONS TO BACHELOR

(No. 9908—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—November 16, 1938—3 pp.*)

Under the Firemen's Annuity and Benefit Fund act, a former member of the Fire Department who resigned therefrom after rendering services for over 20 years, who is beyond the age of rejoining the department, and who has no wife entitled to any annuity upon his death, is entitled, upon application, to a refund of the salary deductions made for widow's annuity purposes.

Widow's annuity deductions should be refunded to a man whenever a situation exists that renders it impossible for any probable widow of his to claim a pension or annuity.

Citation: IRS '37, 24: 944.38, 944.39.

PENSION RIGHTS OF MINOR CHILD

(No. 9920—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—November 30, 1938—2 pp.*)

The pension rights of a minor child of a fireman who retired prior to July 1, 1931 and who was granted a pension under the Firemen's Pension Fund act of 1917, being rights derived through the father, are fixed by the act of 1917.

Citation: IRS '37, 24: 944.52.

C. POLICEMEN'S ANNUITY AND BENEFIT FUND

PENSION PAYMENT TO EMPLOYED PERSON

(No. 9776—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—February 16, 1938—4 pp.)

The Retirement Board of the Policemen's Annuity and Benefit Fund has no right or power to withhold any pension payments due a person who has retired from the police service and is employed in another branch of the City's service. Pension payments may be withheld by the Board only if the retired person re-enters the police service.

Citations:

Cases: *Luthardt v. Retirement Board of the Policemen's Annuity and Benefit Fund*, 273 Ill. App. 387 (1934).

Kelly v. Retirement Board of the Firemen's Annuity and Benefit Fund, 292 Ill. App. 390 (1937).

OPINION OF FOREGOING SYNOPSIS

Replying to your request for an opinion in the matter of withheld pension payments of Michael J. Brierty, the following is submitted:

Your letter states that at the meeting of January 20, 1938, your board referred to me the claim made on behalf of Michael J. Brierty for all pension payments withheld from him and due and owing since June 1, 1931, to date and to pay and to authorize the future payment of all annuities, pensions or benefits at the rate and in the manner provided by law; your letter further states that at the meeting of June 18, 1936, the board directed that the application of Mr. Brierty for a resumption of his pension be denied on the ground that it is against public policy for a pensioner to receive a pension while working in any branch of the city service.

On June 10th, 1931, the City Council of the City of Chicago passed an order to the effect that no person in the service of the city in receipt of a pension should at the same time draw a salary from the city by virtue of employment in any of the departments of the city, and that no such person should be so employed unless he first executed and filed a waiver of his pension payments during the period of his employment by the city. The records show that Mr. Brierty was at that time working for the City of Chicago as a bridge tender by virtue of a civil service appointment. Mr. Brierty refused to sign any waiver on the ground that his position was a civil service appointment and the City Council had no jurisdiction over the validity or legality of his appointment, nor could he be removed excepting as provided in the civil service act. His pension payments were withheld nevertheless on the ground that it was against public policy to pay a pension to a person who was receiving a salary from the same taxpayers.

No further action was taken by Mr. Brierty until June of 1936, when he applied for a resumption of his pension. The case of *Luthardt v. Retirement Board of the Policemen's Annuity and Benefit Fund* (273 Ill. App. 387) had meanwhile been decided by the Appellate Court, and in that opinion was a holding to the effect that it was against public policy to pay a pension to a person who had reentered the public service. On

the basis of this decision the application of Mr. Brierty for a resumption of pension payments to him was denied.

On November 16, 1937, the Appellate Court, in deciding the case of *James F. Kelly v. Retirement Board of the Firemen's Annuity and Benefit Fund* held that the decision in the *Luthardt* case was based upon the waiver which had been signed by Luthardt pursuant to the council order, and that the holding relative to public policy was not necessary to the decision, the Court saying:

"When the legislature enacts pension laws it becomes the duty, not only of boards administering them, but also of the courts, to enforce the laws enacted according to their plain and unmistakable provisions. * * * If it be incongruous for a retired employee to receive a salary in another branch of the service after his retirement as well as his pension, that is a matter for the legislature to remedy. It has frequently been held that to impose conditions other than those imposed by the legislature would be to change the law by judicial construction, and therefore we do not feel justified in holding that it violates the public policy of the state to permit petitioner to draw the salary in question and at the same time receive a pension annuity under the statute. The statute in question was purely a legislative enactment, and it is for the legislature to amend it if it becomes subject to abuses that contravene the public weal."

Thereupon the Appellate Court held that the retirement board of the firemen's annuity and benefit fund had no power or authority to withhold payment of pension to a fireman who was working for the board of education as an engineer custodian. A petition for leave to appeal the *Kelly* case was filed in the Supreme Court in December, 1937 and on February 14, 1938, the Supreme Court denied the petition for leave to appeal, thereby making the holding in the *Kelly* case binding as the last word on the question of the right of a pension board to withhold payments of pension to one who has reentered the public service, when such withholding was based solely on grounds of public policy.

In view of the fact that Mr. Brierty's pension has been withheld from him solely on the ground of public policy, and in view of the action of the Supreme Court in denying leave to appeal the decision in the *Kelly* case, and in view of the fact that the act governing your fund does not give your board any right to withhold payment of a pension excepting where a policeman has reentered the police service, I am of the opinion that your board has no right or power to longer withhold the pension payments due to Mr. Brierty which have heretofore been retained by you, and that it is your duty to now pay to Mr. Brierty all of the moneys which you have withheld, and hereafter pay to him monthly the amount of pension granted to him upon his retirement from the police service, unless he reenters police service.

Opinion No. 9806 to the Retirement Board of Policemen's Annuity and Benefit Fund of April 8, 1938 holds substantially the same as the above opinion.

RIGHTS TO BENEFITS

(No. 9995—Commissioner of Police—E. R. D.—May 4, 1939—1 p.)

An officer who has reached the age of 57 years after serving almost 23 years in the Police Department is entitled to the benefits under the Policemen's Annuity and Benefit Fund act, and his resignation may be accepted.

VOLUNTARY CONTRIBUTIONS AFTER THE AGE OF 57

(No. 10135—*Retirement Board, Policemen's Annuity and Benefit Fund—G. F. M.—November 14, 1939—2 pp.*)

A police matron, whose annuity deductions have been stopped at the age of 57, may voluntarily make payments into the Policemen's Annuity and Benefit Fund in a total amount which when added to her previous salary deductions and the City's total contributions, will create an accumulation sufficient to provide a life annuity of 50% of the salary attached to her rank upon her separation from her service by reason of compulsory retirement or otherwise. However, computation of a life annuity should be on the basis of 57 years of age rather than the retirement age as her annuity became fixed on the date she obtained 57 years of age.

Citation: IRS '39, 24: 960 (f).

**ANNUITY PAYMENT FOR FRACTIONAL PART
OF MONTH OF DEATH**

(No. 9919—*Retirement Board, Policemen's Annuity and Benefit Fund—G. F. M.—November 29, 1938—2 pp.*)

The estate of a former policeman who resigned on July 16, 1935, at which time he was granted an annuity, and who died on October 21, 1938, is entitled to an annuity payment for the first fifteen days of October, 1938. Under the Policemen's Annuity and Benefit Fund act, the first monthly payment of an age and service annuity becomes due and payable one month after the occurrence of the event upon which payment of the annuity depends, and is due and payable each similar monthly period thereafter.

Citation: IRS '37, 24: 959.

**REFUND OF CONTRIBUTIONS OF POLICEWOMAN
NOT ENTITLED TO ANNUITY**

(No. 9808—*Retirement Board, Policemen's Annuity and Benefit Fund—G. F. M.—April 8, 1938—2 pp.*)

A policewoman who has never become entitled to any pension or annuity, and has never received any benefit from the salary deductions paid by her into the Policemen's Annuity and Benefit Fund for pension or annuity purposes, should have refunded to her her salary deductions and a sum paid into the Fund by her for services rendered as a policewoman prior to 1922 with interest on the latter sum at 4% per annum from the date she paid the sum into the Fund to July 1, 1930.

Citation: IRS '37, 24: 945 et seq.

ANNUITY PAYMENTS TO POLICEMAN ON LEAVE

(No. 10032—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—June 13, 1939—2 pp.)

A police officer is not entitled to any annuity following the termination of his period of disability benefit when he continues on leave of absence, as the annuity would be payable only if he had resigned or was discharged from the service. After his death, his widow is not entitled to any money on the basis of such supposed right to annuity.

Citation: IRS '37, 24: 992.

OPINION OF FOREGOING SYNOPSIS

Replying to your request for an opinion in the matter of Michael Glon, the following is submitted:

Your letter states that Michael Glon was born July 23, 1892; that he was appointed to the police department on April 18, 1919; that, effective October 16, 1935, he was awarded ordinary disability benefit because of pulmonary tuberculosis for a maximum duration of three years, five months and four days, being one-fourth of his full period of service in the police department; that Mr. Glon received his disability benefit until the duration expired on March 19, 1939, at which time he was unable to return to active service and continued on leave of absence; that he died on April 22, 1939; that if Mr. Glon had resigned from the Department upon the expiration of his disability benefit, that is, on March 19, 1939, he would have been entitled to a life annuity of \$41.73 per month, which he would have received for one month; and that at the time of making application for annuity for herself, his widow requested information as to whether or not she could be paid the \$41.73 annuity to which her husband would have been entitled as hereinabove stated.

Section 48 of the Act governing your Fund (Ill. Rev. Stat. 1937, Chap. 24, Sec. 992) provides that any policeman who is disabled as a result of any cause other than injury incurred in the performance of an act of duty for a period or periods of time aggregating in excess of one-fourth of the entire term of service rendered by such policeman in the police department, and who shall resign or be discharged from the service while still so disabled and before he shall have attained an age of fifty years, shall have a right to receive an annuity from and after the date of such resignation or discharge from the service. The payment of this annuity is necessarily contingent upon the policeman's being separated from the service through resignation or discharge, as an annuity cannot be paid to a policeman while he is in the service.

I am of the opinion that Michael Glon was not entitled to any annuity following the termination of his period of disability benefit, since he did not resign and was not discharged from the service; and that consequently no amount can be paid to his widow as and for, or on the basis of any annuity to which Michael Glon would have been entitled had he become separated from the service.

SERVICE CREDIT FOR POLICEMAN OF ANNEXED TERRITORY

(No. 9959—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—February 21, 1939—3 pp.)

A person who served as a policeman in a village which has been annexed to the City and who was employed by the City on the date of annexation of this territory by the City, automatically comes under the provisions of the Policemen's Annuity and Benefit Fund act. He is to be given service credit for disability benefit purposes for the period of his preceding service in the annexed territory, provided that the said policeman has made salary deduction payments into the said Fund for the period for which he served in the annexed village.

Citation: IRS '37, 24: 986, 1004a.

**REFUND OF SUMS CREDITED DURING
DUTY DISABILITY PERIOD**

(No. 10114—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—October 10, 1939—2 pp.)

Sums credited for annuity purposes to a policeman for a period during which he was receiving duty disability benefits should not be included in the refund payable to his heirs after his death.

Citation: IRS '39, 24: 989 (h).

SALARY DEDUCTIONS FOR ILLEGALLY RETIRED POLICEMEN

(No. 9881—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—August 31, 1938—4½ pp.)

The amounts to be certified to the City Comptroller by the Retirement Board of the Policemen's Annuity and Benefit Fund as to each illegally retired policeman, should be the total amount of pension or annuity paid to him during any period of illegal compulsory retirement for which he now is to be paid his salary by the City. There should also be certified the amount of salary deductions properly chargeable to each such policeman, together with interest on such deductions at the rate of 4% per annum from the date such salary deductions would have been paid into the Policemen's Annuity and Benefit Fund had such policemen been receiving salary, up to the date such deductions are made from such salary and paid into the said Fund. Payment into the said Fund should be made by the Comptroller within a reasonable time after such certification by the Retirement Board.

Citations:

Statute: IRS '37, 24: 961.

Case: Malloy v. Chicago, 369 Ill. 97 (1938).

PAYMENT OF POLICEWOMAN'S SALARY DEDUCTIONS TO HER HUSBAND

(No. 9807—*Retirement Board, Policemen's Annuity and Benefit Fund*—G. F. M.—April 8, 1938—1½ pp.)

No portion of the refund of deductions made from the salary of a policewoman can be paid to her husband if any of her children survive her, but must be paid entirely to those children.

Citation: IRS '37, 24: 983.

CHILD'S ANNUITY WHERE WIDOW LIVING

(No. 10136—*Retirement Board, Policemen's Annuity and Benefit Fund*—G. F. M.—November 14, 1939—1½ pp.)

The children of the first marriage of a deceased policeman are entitled only to ten dollars per month each as their child's annuity, since the second wife is the widow of the policeman and is still alive.

Citation: IRS '39, 24: 988.

FATAL INJURY IN PERFORMANCE OF DUTY

(No. 9968—*Committee on Finance*—G. F. M.—March 21, 1939—12 pp.)

Where a policeman died within one year of receiving an injury in the course of his employment, and the death could have resulted from the injury, the law presumed the injury was the cause of death under such circumstances, the widow's claim for compensation annuity should be granted unless the Retirement Board can show, (1) that the deceased was not injured in the cause of duty, (2) that another and different cause produced the condition from which he died, or (3) that the greater weight of expert medical testimony is to the effect that an injury of the character claimed could not produce the condition from which the deceased died.

Citation: Code '31: 573, as amended, Coun. J. (1938-39), p. 7342.

WIDOW'S ANNUITY WHEN ANNUITY FUNDS WITHDRAWN DURING POLICEMAN'S LIFETIME

(No. 10115—*Retirement Board, Policemen's Annuity and Benefit Fund*—G. F. M.—October 10, 1939—4 pp.)

Where a policeman, who had served more than ten years, died after he had been separated from the service and while out of the service,

and had withdrawn all sums to his credit for annuity purposes during his lifetime, his widow is excluded from any right to an annuity.

Citation: IRS '39, 24: 982 (c), 983 (a) 3.

PAYMENT OF WIDOW'S SUPPLEMENTAL ANNUITY

(No. 9850—*Retirement Board, Policemen's Annuity and Benefit Fund*—G. F. M.—June 24, 1938—3 pp.)

The supplemental annuity payable to the widow of an employee who died while in the City's service being greater than the minimum annuity provided by the Policemen's Annuity and Benefit Fund act for widows of policemen dying while in the service of the City, the widow should be paid the supplemental annuity and not the minimum annuity.

Citation: IRS '37, 24: 944.

REFUND OF SALARY DEDUCTIONS FOR WIDOW'S ANNUITY TO POLICEMAN'S CHILDREN

(No. 9805—*Retirement Board, Policemen's Annuity and Benefit Fund*—G. F. M.—April 7, 1938—2½ pp.)

Deductions made from the salary of a deceased policeman for widow's annuity purposes, not having been paid to his wife who died before him, should be included as a part of any refund payable to the children of the deceased policeman.

Citation: IRS '37, 24: 983.

D. OTHER ANNUITY AND BENEFIT FUNDS

PAYMENT OF REFUNDED SALARY DEDUCTIONS INTO BOARD OF ELECTION COMMISSIONERS EMPLOYEES' ANNUITY AND BENEFIT FUND

(No. 9843—*Retirement Board, Board of Election Commissioners Employees' Annuity and Benefit Fund*—G. F. M.—June 14, 1938—2½ pp.)

A person who had his salary deductions refunded to him by the Board of Election Commissioners Employees' Annuity and Benefit Fund at the time of his separation from the service of the Board of Election Commissioners, and who has re-entered that service, may not repay those salary deductions into the annuity and benefit fund.

Citation: IRS '37, 46: 533.

OPINION OF FOREGOING SYNOPSIS

Replying to your request for an opinion as to the right of Milton J. Clark, Jr., to repay salary deductions refunded to him at the time of his separation from the service, the following is submitted:

Your letter states that Milton J. Clark became an employee of the board of election commissioners on June 2, 1932; that his total prior service credits up to December 31, 1935, amounted to \$607.27; that he was separated from the service on March 15, 1937; that he is thirty-six years old; that he withdrew his contributions to the fund at the time of his separation from the service; that he is again a contributor to the fund after an absence of one year and two months, and wishes to repay the refund in order to reinstate his prior service credits.

Section 38 of the act governing your fund (Ill. Rev. Stat. 1937, Chap. 46, sec. 533) provides that any employee who shall avail himself of his right to have refunded to him the entire amount which shall have accumulated to his credit for age and service annuity and widow's annuity purposes on the date of his separation from the service from amounts deducted from his salary in accordance with the provisions of your act, and shall withdraw such entire amount so credited to him shall *ipso facto* surrender and forfeit all right to any annuity or other benefits from your fund for himself and for any other person or persons who might benefit through him because of service rendered by him prior to the time he shall make application for refund of said amount; but that such employee shall retain the right to have any period of service previously rendered by him count as service, for annuity purposes only, in computing the term of his service in the event that such employee shall subsequently reenter the service before he shall have obtained an age of sixty-five years and shall become a beneficiary of your fund.

There is no provision in your act which permits an employee to repay the salary deductions which were refunded to him and thereafter have the benefit of those deductions in the computation of his annuity, if he becomes an annuitant. On the contrary, your act specifically provides that by reason of his withdrawing his salary deductions he thereby forfeits all rights to any annuity because of service rendered by him prior to the time he made application for his refund.

I am of the opinion that your board cannot permit Mr. Clark to repay the salary deductions refunded to him at the time of his separation from the service.

DEDUCTIONS FROM SALARIES OF EMPLOYEES PAID ON DAILY BASIS

(No. 9856—*Retirement Board, Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M.—June 30, 1938—2 pp.*)

The deductions made from the salary or wages of contributors to the Laborers' and Retirement Board Employees' Annuity and Benefit Fund working on a daily basis should be computed on the salary or wages actually earned during not to exceed 12½ days of any pay period, and on a salary or wage not exceeding \$10.00 per day.

Citation: IRS '37, 24: 1147, 1148.

OPINION OF FOREGOING SYNOPSIS

Receipt is acknowledged of your letter of June 9th requesting an opinion as to the maximum amount of salary to be considered in computing deductions during any one payroll period on employees who are paid on a daily basis where the work of such employees varies from a few days in one period to fifteen days in another period. Your inquiry is as to whether deductions shall be made from the actual salary earned in each pay period, or from salary earned for service not exceeding twelve and one-half days in any one pay period.

Section 40 of the Act governing your fund (Ill. Rev. Stats. 1937, Chap. 24, Sec. 1147) provides that for all purposes of the Act the schedule to be observed in computing the annual salary of any contributor whose salary or wages shall be arranged upon a daily basis shall be that the annual salary of such employee shall be considered to be three hundred (300) times the daily wage, excepting that no amount of salary or wages in excess of ten dollars (\$10.00) per day shall be considered for any purpose of the Act. This three hundred (300) days per year allows to each such employee twenty-five days per month for salary deduction credits, or twelve and one-half days during each pay period.

Any work given to such employee in excess of twelve and one-half days during any one pay period constitutes extra service during that period so far as concerns the schedule of computation set out in your Act; and Section 41 of your Act provides that no extra service shall be included in computing the term of service of any contributor.

I am of the opinion that in making deductions from the salary or wages of contributors working on a daily basis, such deductions should be computed on the salary or wages actually earned during not to exceed twelve and one-half days of any pay period, and on a salary or wage not exceeding the sum of ten dollars (\$10.00) per day.

LAPSE OF TIME BETWEEN LAST DAY OF WORK AND ACCEPTANCE OF EMPLOYEE'S RESIGNATION

(No. 9809—*Retirement Board, Laborers' and Retirement Board Employees' Annuity and Benefit Fund*—G. F. M.—April 8, 1938—1½ pp.)

When two weeks has elapsed between the day an employee ceased work for the City and the day the department head accepted the employee's resignation, the latter date is the official date of the employee's separation from the City's service.

SCHOOLING FOR BENEFICIARY OVER TWENTY-ONE

(No. 10102—*Board of Trustees of the Policemen's and Firemen's Death Benefit Fund*—G. F. M.—September 20, 1939—5 pp.)

A beneficiary under the Policemen's and Firemen's Death Benefit Fund who is over the age of 21 is entitled to continue to be paid the minor's award when she is enrolled in "an accredited school or college," which may be a school approved by the State Department of Registration and Education or approved by the Board of Trustees of

the Policemen's and Firemen's Death Benefit Fund as one which will benefit the beneficiary.

Citations:

Statute: IRS '37, 127: sec. 60 (3).

Ordinance: Coun. J. (1936-37), p. 2286.

Other reference: Webster's Dictionary "Accredited" (1934 ed.).

OPINION OF FOREGOING SYNOPSIS

Replying to your request for advice on matters referred to in a communication from the Trust Department of the American National Bank and Trust Company, dated August 18, 1939, concerning an interpretation of the ordinance in connection with the administration of the policemen's and firemen's death benefit fund awards, as to what constitutes an accredited school or college, the following is submitted:

Paragraph 30 of Section 574 of the ordinance relating to the policemen's and firemen's death benefit fund (Council Proceedings September 9, 1936, Page 2286) reads in part as follows:

"In the event of the marriage of any beneficiary or in the event that any minor beneficiary other than the widow of the deceased policeman or fireman shall attain the age of twenty-one years and shall be under no mental or physical disability preventing self-support and shall not be attending an accredited school or college, and there are other beneficiaries remaining, the funds remaining in the hands of the trustee bank shall be reallocated for the use and benefit of the other beneficiary or beneficiaries. * * *"

The ordinance referred to does not define the phrase "accredited school or college," and it therefore becomes necessary to consider that phrase as it concerns and applies to persons affected by the ordinance in question.

Webster's Dictionary (1934 Edition) defines the word "accredited" as follows: "Accredited: Publicly or officially sanctioned and authorized; officially vouched for or guaranteed as conforming to a prescribed or desirable standard, as an accredited school or college."

In the absence of a specific definition in the ordinance, it would appear that a school or college which is "officially vouched for or guaranteed as conforming to a prescribed or desirable standard," or which is "publicly or officially sanctioned and authorized" should be considered an accredited school or college. In the present instance a school or college should be considered "accredited" if it is officially sanctioned and authorized by the State, or if it is vouched for as conforming to a prescribed or desirable standard by the Board of Trustees of your Fund, acting officially as trustees charged with the administration of the fund created by the ordinance in question.

The Statutes of Illinois (Ch. 127, Section 60, Par. 3) give to the Department of Registration and Education of the State of Illinois the power to "prescribe rules and regulations defining, for the respective professions, trades and occupations, what shall constitute a school, college or university, or department of a university, or other institutions," to establish standards for such schools and to issue and revoke licenses therefor.

A school or college should therefor be deemed "accredited" if the Department of Registration and Education has given its approval to such school or college. As to a specialized engineering school, or a business and general night school, which may not have been given con-

sideration by the Department of Registration and Education, or which may not have met with its approval, it is respectfully suggested that since your honorable body is charged with the duty and responsibility of administering this fund, if your honorable body is satisfied that such particular school or college is functioning in a manner which carries out the intent of the provision of the ordinance hereinabove quoted, and officially sanctions and approves the attendance of a beneficiary at such school or college, then such latter school or college should be deemed to be an "accredited" school or college within the intent and purpose of the ordinance.

The intent of the quoted provision of the ordinance is to encourage minor beneficiaries in continuing their education after they have attained an age of twenty-one years by rendering it impossible for them to receive in cash any portion of the award granted to them, after their attainment of the age of twenty-one years. The whole purpose of this provision of the ordinance is to provide an opportunity and give encouragement to the children of deceased policemen and firemen to obtain that education of which the death of their respective fathers might otherwise have deprived them. This is accomplished by making it possible for them to learn a trade or profession or to acquire academic training without regard to the age of the individual concerned.

Whether an individual beneficiary of the class here under consideration is engaged in gainful occupation or not, is immaterial so long as such beneficiary is attending an accredited school or college. Neither is enrollment in a full prescribed course required under the ordinance, since the student might desire to take a course in stenography only, or in engineering only, or in some other study, and such study would be in conformity with the intent and purpose of the ordinance.

The important question is whether or not the beneficiary concerned is pursuing a course of study which will conduce to his or her betterment. As heretofore stated, if the school or college at which the beneficiary concerned is pursuing his or her individual study is approved by the Department of Registration and Education, or is approved by your honorable body, such school or college should be considered to be an "accredited school or college" within the purpose and intent of the ordinance governing the administration of the policemen's and firemen's death benefit fund, and the beneficiary concerned remains entitled to continue to be paid the award.

As the above opinion answers all of the questions asked in the communication from the National Bank and Trust Company heretofore referred to, it is not deemed necessary to set out the questions and repeat the answers.

There is being returned herewith the communication from the American National Bank and Trust Company hereinbefore mentioned.

PERSON EXEMPT FROM MUNICIPAL COURT AND LAW DEPARTMENT EMPLOYEES' ANNUITY AND BENEFIT FUND

(No. 9796—Retirement Board, Municipal Court and Law Department Employees' Annuity and Benefit Fund—G. F. M.—March 15, 1938—1½ pp.)

A person in the service of the Municipal Court who is a participant in, contributor to, or beneficiary of another annuity and benefit fund is exempt from the benefits of the Municipal Court and Law Department Employees' Annuity and Benefit fund.

Citation: IRS '37, 37: 516.

CHAPTER IV

RELATIONS OF CITY WITH OTHER GOVERNMENTS

A. CHICAGO HOUSING AUTHORITY

GARNISHMENT OF SALARIES OF EMPLOYEES OF CHICAGO HOUSING AUTHORITY

(No. 9815—*Chicago Housing Authority*—A. F. G.—April 19, 1938—2½ pp.)

The Chicago Housing Authority is a public institution brought into existence and maintained solely for the purpose of performing certain administrative functions of the State, and therefore, is not subject to garnishment of the salaries or wages of any of its employees.

Citations:

Statute: Housing Authorities act, sec. 8.

Cases: *Merwin v. Chicago*, 45 Ill. 133 (1867).

Addystone Pipe and Steel Co. v. Chicago, 170 Ill. 580 (1897).

Chicago v. People, 98 Ill. App. 517 (1902).

Lamb v. Lamb, 256 Ill. App. 226 (1930).

PAYMENT OF FEDERAL INCOME TAX BY EMPLOYEES OF CHICAGO HOUSING AUTHORITY

(No. 9795—*Chairman, Chicago Housing Authority*—A. F. G.—March 15, 1938—7½ pp.)

The compensation paid employees of the Chicago Housing Authority is exempt from the Federal income tax, as the Chicago Housing Authority is an instrumentality of the State created to carry on a governmental function which is recognized and aided by the Federal government.

Citations:

Statutes: IRS '37, 67½: 2, 8.

United States Housing act (1937), sec. 1, 2 (subpar. 11), sec. 5 (subpar. e), secs. 9 to 11.

Cases: *McCulloch v. Maryland*, 17 US 316 (1819).

Collector v. Day, 78 US 113 (1870).

Metcalf and Eddy v. Mitchell, 269 US 514 (1925).

Helvering v. Powers, 293 US 214 (1934).

Ohio v. Helvering, 292 US 360 (1933).

James v. Dravo Contracting Co., 58 S. Ct. 208 (1937).

Helvering v. Therrell, 82 US (L. ed.) 537 (1938).

Spahn v. Stewart, 268 Ky 97 (1937).

Adler v. Deegan, 251 NY 467, 167 NE 705 (1929).

OPINION OF FOREGOING SYNOPSIS

Your letter of February 11, 1938, in which you ask to be advised whether employees of the Chicago Housing Authority are subject to the Federal income tax laws, has been referred to the undersigned.

We assume that what you want to know is, is the compensation received by employees of the Authority from the Authority subject to be taxed as income by the United States Government.

The answer depends upon whether the Housing Authority was created and is conducted in the exercise of a governmental function. If so, its operations are immune from Federal taxation and, as a necessary corollary, the salaries and compensation of its officers and employees in their capacity as such are likewise immune.

Ever since the famous case of *McCulloch v. Maryland*, 4 Wheat. 315, in which a tax on a Federal bank by the State of Maryland was held unconstitutional and that equally famous case of *The Collector v. Day*, 11 Wall 113, in which the right of the Federal government to tax the salary of a judicial officer of the State of Massachusetts was determined against the right, nothing is more settled than the principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the states, and that the instrumentalities, means and operations whereby the states exert the governmental powers belonging to them are equally exempt from taxation by the United States.

This principle is implied from the independence of the National and state governments within their respective spheres and from the provisions of the Constitution which looks to the maintenance of the dual system.

In discussing this principle the court in *Collector v. Day*, *supra*, said:

"* * * Such being the separate and independent condition of the States in our complex system as recognized by the Constitution * * * it would seem to follow as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence and fulfilling the high and responsible duties assigned to them in the constitution should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledged no limits, but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer the laws."

In the more recent case of *Metcalf and Eddy v. Mitchell*, 269 U. S. 514, the court, after a careful review of this question, strictly applied the rules laid down in the earlier cases. After holding that the recipients of the income sought to be taxed in that case were not officers or employees of the State, the court said:

"Just what instrumentalities of either a state or the Federal government are exempt from taxation by the other cannot be stated in terms of universal application. But this court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers are immune from the taxing power of the other. * * *

* * * * *

"While it is evident that in one aspect the extent of the exemption must finally depend upon the effect of the tax upon the functions

of the government alleged to be affected by it, still the nature of the governmental agencies or the mode of their constitution may not be disregarded in passing on the question of tax exemption; for it is obvious that an agency may be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government, that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power."

However, the tendency of the courts has been to narrow the limits as far as possible of the exemptions which have been claimed. In *Helvering v. Powers*, 293 U. S. 214, the United States Supreme Court held that the compensation of the Board of Trustees of the Boston Elevated Railway Company was subject to Federal income tax, notwithstanding they were appointed by the Governor of the State, confirmed by the Council and endowed with large powers to regulate and fix fares etc., and said: "The fact that the State has power to undertake such enterprises, and that they are undertaken for what the State conceives to be the public benefit, does not establish immunity."

In *Ohio v. Helvering*, 292 U. S. 360, the same court held that the agencies and operations of the State of Ohio in the conduct of its Department of Liquor Control were subject to excise taxes prescribed by Congress, and said: "Whenever a state engages in a business of a private nature it exercises nongovernmental functions, and the business, though conducted by the state, is not immune from the exercise of the power of taxation which the Constitution vests in the Congress."

In the recent case of *James v. Dravo Contracting Company*, U. S. Sup. Ct., December 6, 1937 (5 U. S. L. Wk. 215), the Supreme Court further limits the exemption by upholding the privilege tax imposed by the State of West Virginia upon an independent contractor constructing locks and dams on a Federal project in that State under contracts with the United States Government.

In *Helvering v. Therrell*, decided by the United States Court February 28, 1938, Law Ed. Advance Opinions, Vol. 82, No. 11, 537, it was held that the Federal Government had power to tax compensation paid to attorneys and others out of corporate assets for necessary service rendered about the liquidation of an insolvent corporation by a State officer proceeding as required by the State statutes.

While we incline to the view that the activities of the Authority are governmental it is conceivable that the courts, in view of their tendency to narrow the field of exemption, may hold that the operation of housing projects is not such a traditional governmental function as to bring it within the Constitutional implication.

The Chicago Housing Authority is an instrumentality of the State created by statute to exercise a governmental function. The "Housing Authorities act," approved March 19, 1934, in Section 2 declares low-cost housing and slum clearance is essentially in the public interest in the following language:

"2. Low-cost housing and slum clearance declared essential to public interest.] Sec. 3. It is hereby declared as a matter of legislative determination that in order to promote and protect the health, safety, morals and welfare of the public, it is necessary in the public interest to provide for the creation of public corporate bodies to be known as housing authorities, and to confer upon and vest in said housing authorities all powers necessary or appropriate in order that they may engage in low-cost housing and slum clearance projects; and that the powers herein conferred upon the housing authorities.

including the power to acquire property, to remove unsanitary or sub-standard conditions, to construct and operate housing accommodations and to borrow, expend and repay moneys for the purposes herein set forth, are public objects essential to the public interest."

Ill. Rev. Stat. 1937, p. 1760.

Section 8 of the same act provides that: "An Authority shall constitute a body both corporate and politic, exercising public powers, and having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this Act. * * *"

The "United States Housing Act of 1937" in Section 1 has the following declaration of policy:

"Section 1. It is hereby declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this Act, to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and acute shortage of decent, safe, and sanitary dwellings for families of low income, in rural or urban communities, that are injurious to the health, safety, and morals of the citizens of the Nation."

Subparagraph 11 of Section 2 defines "public housing agency" to mean "any State, county, municipality, or other governmental entity or public body (excluding the Authority), which is authorized to engage in the development or administration of low-rent housing or slum clearance."

By Section 9 of the United States Housing act the Authority "may make loans to public-housing agencies to assist the development, acquisition, or administration of low-rent-housing or slum-clearance projects by such agencies."

Section 10 provides that: "The Authority may make annual contributions to public housing agencies to assist in achieving and maintaining the low-rent character of their housing projects."

Section 11 provides an alternative method of assisting public-housing agencies in certain cases by making capital grants to assure the low-rent character of the project.

Subparagraph (e) of Section 5 provides for tax exemption in the following language:

"* * * Obligations, including interest thereon, issued by public housing agencies in connection with low-rent-housing or slum-clearance projects, and the income derived by such agencies from such projects, shall be exempt from all taxation now or hereafter imposed by the United States."

The courts of Illinois have not construed the Housing Authorities act but the Supreme Courts of New York and Kentucky have passed on similar acts adopted by the Legislatures of the respective States. In both cases the courts found that slum clearance was in the interest of public health, morals and general welfare and was an exercise of the police power, hence a public purpose or function.

The question in both of these cases was whether slum clearance was such a public purpose as to authorize the exercise of eminent domain, and in the Kentucky case there was also the question of exemption from taxation of the bonds issued by the Housing Authority in furtherance of the purposes of the Authority under a constitutional provision exempting from taxation bonds issued for public purposes.

In *Spahn v. Stewart*, 268 Ky. 97, the court, quoting with approval from *New York City Housing Authority v. Muller*, 270 N. Y. 333, said:

"'Slum areas are the breeding places of disease which take toll not only from denizens, but, by spread, from the inhabitants of the entire city and state. Juvenile delinquency, crime, and immorality are there born, find protection, and flourish. Enormous economic loss results directly from the necessary expenditure of public funds to maintain health and hospital services for afflicted slum dwellers and to war against crime and immorality. * * * Concededly, these are matters of state concern (*Adler v. Deegan*, 251 N. Y. 467, 477, 167 N. E. 705). * * * Time and again, in familiar cases needing no citation, the use by the Legislature of the power of taxation and of the police power in dealing with the evils of the slums, has been upheld by the courts. Now, in continuation of a battle, which if not entirely lost, is far from won, the Legislature has resorted to the last of the trinity of sovereign powers by giving to a city agency the power of eminent domain.'"

In *Adler v. Deegan*, *supra*, which involved a phase of slum clearance, Justice Cardozo, now a member of the United States Supreme Court, said:

"The Multiple Dwelling Act is aimed at many evils, but most of all it is a measure to eradicate the slum. It seeks to bring about conditions whereby healthy children shall be born, and healthy men and women be reared. * * * The end to be achieved is more the avoidance of pestilence or contagion. If the moral and physical fibre of its manhood and its womanhood is not a state concern, the question is, what is? Till now the voice of the courts has not faltered for an answer."

From the foregoing we are of the opinion that the Chicago Housing Authority is an instrumentality of the State, created by the laws of the State of Illinois to carry on a governmental function and recognized as such and aided in its purposes by the Federal Government. Its income is expressly exempt from Federal taxation by the United States Housing act of 1937 and in our opinion the compensation paid by it to its officers and employees is exempt from Federal income tax under the principles laid down in *Collector v. Day*, *supra*.

MEETINGS OF THE CHICAGO HOUSING AUTHORITY

(No. 9893—*Executive Secretary, Chicago Housing Authority*—A. F. G.—N. N. E.—September 30, 1938—2½ pp.)

Under the by-laws of the Chicago Housing Authority, unless a resolution is presented and adopted fixing the time and place of the next meeting of the Authority, any meeting called is a special meeting, which requires notice, and at which only such business may be transacted as is included in the call for the meeting.

Citation: Chicago Housing Authority By-laws, art. II, secs. 2, 3.

OATH OF OFFICE BY CHICAGO HOUSING AUTHORITY COMMISSIONERS

(No. 9765—*Chairman, Chicago Housing Authority*—A. F. G.—January 27, 1938—3 pp.)

The Commissioners of the Chicago Housing Authority are not required by the State constitution or by statute to take an oath of office.

Citations:

Constitution: Illinois, art. V, sec. 25.

Statutes: Cities and Villages act, art. VI, sec. 4.

Housing Authorities act.

Case: School Directors of District No. 13 v. People ex rel. Roberts, 79 Ill. 511 (1875).

RESIGNATION OF CHICAGO HOUSING AUTHORITY COMMISSIONER

(No. 9924—*Executive Secretary, Chicago Housing Authority*—A. F. G.—December 5, 1938—6 pp.)

A person who is duly appointed as Commissioner of the Chicago Housing Authority continues in office, notwithstanding his attempted resignation, until his successor is duly appointed and qualified.

In the absence of a statute to the contrary, the resignation of an officer does not become effective until accepted by the proper authorities. Where by law the term of an officer is until his successor has been appointed and qualified, the resignation even if accepted by the proper authority will be treated as of no effect until a successor has been appointed and qualified.

Citations:

Statutes: IRS '37, 67½.

Housing Authorities act, sec. 3.

Cases: Edwards v. United States, 103 US 471, 473, 475, 26 L. Ed. 314 (1880).

People v. Williams, 145 Ill. 573 (1893).

People v. Supervisor, 100 Ill. 332 (1881).

Badger et al. v. United States ex rel. Bolles, 93 US 599 (1876).

United States v. Green, 53 Fed. 769 (1892).

Other reference: 46 CJ 978, sec. 129.

OPINION OF FOREGOING SYNOPSIS

On December 2, 1938 you telephoned the writer that a question had arisen as to the status of Mr. Victor Olander as a Commissioner of the Chicago Housing Authority. You stated the facts to be as follows: Mr. Olander, a duly appointed Commissioner of the Authority, on August 26, 1938 tendered his resignation to the Mayor of Chicago. The Mayor has not accepted the resignation nor has he appointed a successor to Mr. Olander. You wish to know if Mr. Olander is still a Commissioner of the Authority notwithstanding his attempted resignation.

The rule of law laid down in Corpus Juris is as follows:

"While the right of an officer to resign is well recognized, it is also generally held that in the absence of statute his resignation does not become effective until accepted by the proper authorities." 46 Corpus Juris, Section 129, page 978.

Decisions from more than a dozen States, including Illinois, Indiana, Michigan, New Jersey, New York, Ohio and Pennsylvania, and from the Supreme Court of the United States are cited supporting this rule.

In discussing the reason for this rule the Supreme Court of the United States said:

"* * * 'As civil officers are appointed for the purpose of exercising the functions and carrying on the operations of government, and maintaining public order, a political organization would seem to be imperfect which should allow the depositaries of its power to throw off their responsibilities at their own pleasure. This certainly was not the doctrine of the common law. In England a person elected to a municipal office was obliged to accept it and perform its duties, and he subjected himself to a penalty by refusal. An office was regarded as a burden which the appointee was bound, in the interest of the community and of good government to bear. And from this it followed of course that, after an office was conferred and assumed, it could not be laid down without the consent of the appointing power. This was required in order that the public interests might suffer no inconvenience for the want of public servants to execute the laws. * * * And in view of the manifest spirit and intent of the laws above cited, it seems to us apparent that the common-law requirement—namely, that a resignation must be accepted before it can be regarded as complete—was not intended to be abrogated. To hold it to be abrogated would enable every office-holder to throw off his official character at will, and leave the community unprotected. We do not think that this was the intent of the law.'" *Edwards v. U. S.*, 103 U. S. 471, 473, 475, 26 L. ed. 314.

Our Supreme Court in passing on the same question in *People v. Williams*, 145 Ill. 573, held that as an office is a burden on the appointee which he is bound in the interest of the public to bear, he has not the right on his own motion to resign the same. His resignation will not become effective to relieve him from the duties of the office until accepted by lawful and competent authority.

In discussing this rule further Corpus Juris in the same section referred to above at page 978 sets out this proposition of law, "where by law the term of an officer is until his successor has qualified, the resignation of the office, even if accepted by the authority provided by law for the acceptance of resignations, will be treated as of no effect until a successor has duly qualified." Citing *Badger v. U. S.*, 93 U. S. 599; *U. S. v. Green*, 53 Fed. 769; *Keen v. Featherston*, 29 Tex. Civ. A. 563 and *Wonemoc v. State Industrial Comm.*, 178 Wis. 656.

In the Housing Authorities Act which creates the office of Commissioner, section 3 provides in part as follows:

"At the expiration of the term of each such commissioner, and of each succeeding commissioner, or in the event of a vacancy, the presiding officer shall appoint a commissioner, subject to the approval of the State Housing Board as aforesaid, to hold office, in the case of a vacancy for the unexpired term, or in the case of expiration for a term of five years, or until his successor shall have been appointed and qualified. Each such appointment shall be effective upon the filing by the State Housing Board of a certificate of appointment and of its approval thereof, as hereinbefore provided."

In the *People ex rel. v. Supervisor*, 100 Ill. 332, a town supervisor under

a Township Organization act which provides, that "town officers except as otherwise provided, shall hold their offices for one year, and until others are elected or appointed in their place, and are qualified," resigned his office and his resignation was accepted, and at the next election his successor was elected supervisor of the town. This successor, however, though elected, failed to qualify. The Court held that the resigning officer could only cease to be supervisor by both the election and qualification of a successor. In discussing this matter the court said:

"This provision that officers shall hold their offices for a time named, *and until their successors are elected and qualified*, is not peculiar to the Township Organization act. It is likewise the provision of the State constitution, that the judges of the courts, State's attorneys, justices of the peace and constables, and county officers, shall hold their offices until their successors shall be qualified. All this shows a significance in this provision, and denotes as the policy of our law that the public convenience shall not suffer from a vacancy in such public offices, but that the office shall ever be full, so that there will always be some one competent to perform the duty belonging to the office. If we were not to allow to this respondent the power, before his successor shall qualify, to perform the merely ministerial official act of signing these bonds, which this court has ordered his predecessor in office to perform, then this careful provision of the law that the officer shall hold his office until his successor is elected *and qualified*, will be denied effect, and be made nugatory. No distinction in this respect is to be drawn between a resignation and the expiration of the time fixed for the holding of the office. A resignation ends the term of office, the same as the expiration of the time of the tenure of the office does, and no more effectually. The effect in either case is just the same. Whatever power there is in the latter case to act officially until the qualification of a successor, must exist equally in the case of a resignation."

This view that the qualification of a successor was necessary to divest an officer who had resigned came under the consideration of the Supreme Court of the United States in the case of *Badger et al. v. United States ex rel. Bolles*, 93 U. S. 599, which involved an Illinois officer, whereupon an examination of the several provisions of our Township Organization act and constitution bearing upon the subject, it was held that a supervisor, town clerk or justice of the peace in this State, although his resignation is tendered to and accepted by the proper authority, continues in office and is not relieved from his duties and responsibilities as a member of the board of auditors, under the Township Organization law of this State, until his successor is appointed or chosen and qualified. In reference to a resignation it was there said:

"Where it is said in the statute that the resignation may be thus accepted it is like to the expiration of the term of office. In form the office is thereby ended but to make it effectual it must be followed by the qualification of a successor."

To like effect is *United States v. Green*, 53 Fed. 769, where the mayor and aldermen of the City of Lathrop, Mo., having been served with a writ of mandamus to enforce the collection of a judgment against the city made no response thereto, and the aldermen immediately offered their resignations, which were accepted by the mayor, and adjourned sine die, and no others were elected to take their places. Held that, as they are still the governing body of the city, they were guilty of contempt in refusing to comply with the writ of mandamus.

Reference was made in the decision to the ruling in the *Badger* case, *supra* (where it was held that municipal officers resigning under circum-

stances like these continue to hold office until their successors are elected and qualified.) The court said:

"The statute of Illinois on which that decision was based provided, just as the Missouri statute, that such officers, not withstanding their attempted resignation, continue in office until their successors are duly elected and qualified."

In view of the foregoing authorities and in view of the provision in section 3 of the Housing Authorities Act quoted above, we are of the opinion that Mr. Olander is still a commissioner of the Chicago Housing Authority and will remain such until his successor is appointed and qualified.

PAYMENT FOR LEGAL SERVICES TO HOUSING AUTHORITY

(No. 9977—*Chicago Housing Authority—A. F. G.—April 10, 1939—1½ pp.*)

Where legal services were rendered by a private attorney to the Chicago Housing Authority at its direction, though not authorized by formal resolution of the Authority, payment for the services should be made.

CO-SIGNATURES FOR CHECKS AND VOUCHERS OF HOUSING AUTHORITY

(No. 9933—*Executive Secretary, Chicago Housing Authority—A. F. G.—December 14, 1938—2 pp.*)

A change of the by-laws of the Chicago Housing Authority is required to provide for co-signatories to all checks and vouchers. A notice of such proposed change must be given in the call for the special meeting to amend the by-laws.

Citation: Chicago Housing Authority By-laws, art. I, sec. 8, art. III, sec. 3.

LOAN TO CHICAGO HOUSING AUTHORITY

(No. 9840—*City Comptroller—A. F. G.—June 10, 1938—3½ pp.*)

The Comptroller has authority, if funds are available, to make a loan to the Chicago Housing Authority, as there has been an appropriation from which the loan may be made, a City Council resolution has authorized the loan, and the Chicago Housing Authority has directed its chairman to negotiate the loan.

Citations:

Statutes: Housing Authorities act, secs. 6, 8.

Ill. Laws, 1937, p. 677 Housing Cooperation act, sec. 4.

Ordinances: Coun. J. (1938-39), pp. 6042, 6098, 6191.

Other reference: Chicago Housing Authority By-laws, art. I, sec. 6.

OPINION OF FOREGOING SYNOPSIS

A judgment note for \$5,000.00, executed by The Chicago Housing Authority by Joseph W. McCarthy, Chairman, was this day presented to you as evidence of a loan of that amount from an appropriation of \$10,000.00 in the annual appropriation bill for "Expense of Chicago Housing Authority." (Coun. J., January 12, 1938, p. 5155.) You inquire as to the authority of Mr. McCarthy to execute this instrument.

On May 25, 1938 Mayor Kelly appointed, as Commissioners of The Chicago Housing Authority, Joseph W. McCarthy, 5200 Blackstone avenue, and Edgar L. Schnadig, 928 Hyde Park boulevard, to succeed respectively T. J. Carney and John R. Fugard, both of whom had resigned as Commissioners of The Chicago Housing Authority. (Coun. J., May 25, 1938, p. 6042.)

These appointments were approved June 3, 1938 by the State Housing Board and the certificate of the said Board has been filed in the office of the Recorder of Deeds of Cook County as Document No. 12167819, as required by law.

On June 3, 1938 Mayor Kelly advised the City Council of the approval by the State Housing Board of these appointments. (Coun. J., June 3, 1938, p. 6098.)

Section 6 of the Housing Authorities act, under which The Chicago Housing Authority is created, is as follows:

"6. Organization of Authority—Assistants and Employees.) Section 6. As soon as possible after the creation of an Authority the commissioners shall organize for the transaction of business by choosing from among their number a chairman and a vice-chairman and by adopting by-laws and rules and regulations suitable to the purposes of this Act. Three commissioners shall constitute a quorum for the transaction of the business thereof. The commissioners shall, from time to time, select and appoint such officers and employees, including engineering, architectural and legal assistants, as they may require for the performance of their duties, and shall prescribe the duties and compensations of each officer and employee."

At a meeting of The Chicago Housing Authority held June 3, 1938, Joseph W. McCarthy was elected Chairman of the said Authority.

Section 6 of Article I of the By-Laws of The Chicago Housing Authority reads as follows:

"Section 6. *Chairman.* The Chairman shall be the chief executive officer of the Authority; he shall preside at all meetings of the Authority and sign all official orders thereof; he shall have general supervision over the business and affairs of the Authority, subject to the direction of the Authority; he shall see that all orders and resolutions of the Authority are carried into effect; in carrying out the resolutions of the Authority he shall execute bonds, mortgages and other contracts requiring the seal under the seal of the Authority, and he shall also have such additional powers and duties as may from time to time be imposed upon him by the Authority; subject, however, to the right of the Authority to delegate any specific power, except such as may be by statute exclusively conferred on the Chairman, to any other officer or officers of the Authority."

Section 8 of the Housing Authorities act in the fifth paragraph provides that an Authority shall have power:

"To borrow money upon its bonds, notes, debentures, or other

evidences of indebtedness and to secure the same by pledge of its revenues or in any other manner. * * *

At the meeting of June 3rd, above referred to, the Authority directed Joseph W. McCarthy, Chairman, to borrow \$5,000.00 from the City of Chicago and to execute a note for this amount as evidence of the loan for the purpose of meeting overdue pay rolls of the central office of the Authority.

By Subsection (h) of Section 4 of the "Housing Cooperation Law," filed July 13, 1937, Laws 1937, page 677, the City of Chicago is authorized to:

"(h) Lend money to the housing authority from time to time, which, when it has funds available for such purpose, shall make reimbursements for all loans made to it, together with interest thereon;"

At its meeting June 10, 1938 the City Council, by resolution adopted in conformity with the Housing Authorities act, authorized the City Comptroller to loan to The Chicago Housing Authority a sum not to exceed \$10,000.00 for a period not to exceed five years, upon a note or notes signed by the Chairman of said Authority.

From the foregoing we are of the opinion that the note is duly authorized, being executed by the Chairman of the Authority and authorized by resolution of the Authority at its meeting of June 3, 1938. However, we do not believe the note should be in judgment form, but should be an ordinary promissory note payable on or before five years after date.

It is our opinion, therefore, in view of the appropriation made to The Chicago Housing Authority by the City Council, the resolution of the City Council authorizing this loan and the action of the Authority in directing its Chairman to negotiate this loan, you have authority, if funds are available, to make this loan.

HOUSING BONDS AS DEBTS

(No. 10015—Chairman, Subcommittee on Housing—A. F. G.—May 22, 1939—4 pp.)

The debt limit imposed on cities does not extend to the issuance of bonds by the Chicago Housing Authority, as the Housing Authorities act expressly provides that bonds of an authority shall not constitute an "indebtedness" within the meaning of any debt limitations.

Citations:

Constitution: Illinois, act 9, sec. 12.

Statute: Housing Authorities act, secs. 2, 9, 24, 25.

Case: Krause v. Peoria Housing Authority, 370 Ill. 356 (1939).

LOAN TO HOUSING AUTHORITY BY CITY

(No. 9957—Executive Secretary, Chicago Housing Authority—A. F. G.—February 18, 1939—2½ pp.)

Funds loaned to the Chicago Housing Authority by the City have no limitations upon their use except the implied limitation that they

can be used only for purposes within the statutory powers of the Authority.

The loan to the Authority authorized by the City in its 1939 budget might have been made into a contribution or appropriation by amending the annual appropriation ordinance at the meeting after its passage, but thereafter no further appropriation may be made prior to the passage of the next annual appropriation bill.

ISSUANCE OF LOAN NOTES BY HOUSING AUTHORITY

(No. 10128—*Chicago Housing Authority—N. N. E.—November 3, 1939—2½ pp.*)

The Chicago Housing Authority is empowered by statute to adopt resolutions authorizing it to issue advance loan notes to the United States Housing Authority and temporary loan notes to others loaning funds. The local Authority may also enter an agreement with the USHA that the funds to be deposited by it on the advance loan notes are to be used by the local Authority for the payment of principal and interest on said temporary loan notes.

Citation: IRS '39, 67½.

COOPERATION AGREEMENT BETWEEN CITY AND HOUSING AUTHORITY

(No. 10161—*Chicago Housing Authority—N. N. E.—December 19, 1939—3½ pp.*)

The Chicago Housing Authority and the City are by statute empowered to enter into a cooperation agreement whereby the Authority agrees to pay a certain service charge in lieu of taxes and the City agrees to the following: to eliminate unsafe and unsanitary dwelling units equal to the number of new units to be constructed in the new project; to furnish the project, without cost to the Authority and the tenants of the project, the usual municipal services furnished to other dwellings and inhabitants in the City; to waive building and inspection fees; to vacate such streets and alleys within the area of the project as may be necessary; to accept the dedication of land for new streets and alleys; and to zone or rezone to a proper residential classification the project area.

Citations: IRS '39, 67½: 27b, 31, 120: 500 (12).

COOPERATION AGREEMENT WITH THE CHICAGO HOUSING AUTHORITY

(No. 10067—Chicago Housing Authority—N. N. E. & A. F. G.—August 3, 1939—6 pp.)

The cooperation agreement between the Chicago Housing Authority and the City should be submitted to the City Council in the form of an ordinance and not as a resolution.

As the City has power to eliminate unsafe, unsanitary and dilapidated buildings, the City Council may enter into the cooperation agreement providing that the City will eliminate unsafe or unsanitary dwelling units equal in number to the number of new units to be provided in the low rent housing projects.

Citations:

- Statutes: Cities and Villages act, art. V.
IRS '37, 24: 62, 75, 78, 185.
Housing Cooperation act, sec. 4k.
Ordinances: Code '31: 172, 1702, 2236, 2237.
New Building ordinance, sec. 201.06.
Cooperation Agreement, Coun. J. (1938-39), pp. 7211 to 13.

OPINION OF FOREGOING SYNOPSIS

This is to acknowledge receipt of your letters dated July 21, 1939, enclosing a copy of a resolution containing the tentative draft of an agreement between the City of Chicago and the Chicago Housing Authority, called the Cooperation Agreement, required by the United States Housing Authority as part of your contract for the securing of loans and grants for the construction of low-cost housing projects.

In your letters you request an opinion of this department as to whether the document submitted to us "is a proper document for submission to the City Council of Chicago?" In our conversation with you, subsequent to the receipt of your letters, we pointed out that the document in its present form cannot be introduced into the City Council—that to be properly presented it would have to be in the form of an ordinance. We know, however, that your request for an opinion is primarily directed to the right of the City of Chicago to enter into the proposed cooperation agreement with the Authority.

Paragraphs 10-21 both inclusive of the present proposal are very similar to an agreement entered into between the City of Chicago and the Chicago Housing Authority with reference to the South Park Gardens Project (C. J. November 3, 1938, pp. 7211-7213).

The Corporation Counsel passing upon the agreement of the South Park Gardens Project, in an opinion dated November 15, 1938 held, "That both parties to this agreement have been granted statutory power to enter into this contract." In considering the contract in question, we find ample authority in the Housing Authorities Act and the Housing Cooperation Act for the City of Chicago and the Authority to enter into this agreement and particularly to bind themselves to terms and conditions of paragraphs 10-21 contained therein.

Paragraphs 10-21 above referred to provide in general for the follow-

ing: For the payment by the Authority of a service charge of —% of the shelter rentals of the project in lieu of taxes; for, the furnishing by the city without cost or charge to the Authority or the tenants thereof, municipal services and facilities for such project and the tenants thereof of the same character as those furnished without special cost or charge for other dwellings and inhabitants in the city; the agreement by the city to plan or re-plan, zone or re-zone, if necessary, the area in the city within which the project shall be located; the agreement by the city to accept land dedicated by the Authority and which is deemed reasonably necessary for public streets and alleys and to vacate and close any streets, alleys, roads, roadways, sidewalks or other places which the Authority finds are reasonably necessary in the development of the project located in the area of the project; the agreement by the city to furnish, pave, install, grade or re-grade, plan or re-plan any public streets, etc., located in the area of the project and which the Authority finds necessary in the development of such project, the cost of such work to be financed in a manner agreed upon by the Authority and the city and approved by the United States Housing Authority; the agreement by the city to waive building and inspection fees and make exceptions from building regulations and ordinances when necessary to the development of the project.

By paragraphs 1-9, both inclusive, of the proposed agreement, the City of Chicago agrees to eliminate unsafe or insanitary dwelling units equal in number to the number of new dwelling units to be provided in the low-rent housing projects. These provisions are not to be found in the agreement of November 3, 1938 above referred to, but the Authority to enter into such an agreement is to be found in Section 4(k) of the Housing Cooperation Act which reads as follows:

“(k) Enter into agreement with respect to the exercise by such state public body of its powers relating to the repair, elimination or closing of unsafe, insanitary or unfit dwellings.”

There is sufficient power granted the City of Chicago in Article V, Cities and Villages Act, to demolish property that has become unsafe, insanitary or unfit for human occupancy.

Section 62 of that Act (Ill. Rev. Stats., 1937, chap. 24) provides that the City Council may demolish a building that has been damaged “by fire, decay or otherwise to the extent of fifty percent of the value.” This section is limited to wooden buildings and requires that the owner first be ordered to remove said building before the city can act directly.

Authority is also granted the city in Section 185 of the Act “to declare and define nuisances and abate the same, * * *.” And in Section 75, the City Council is empowered “to declare what shall be a nuisance, and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist.” Also by virtue of Section 78 the City Council can abate a nuisance “in the promotion of health or the suppression of disease.”

Under the power thus granted as to declaring and abating nuisances the City Council of Chicago has by ordinance (Section 1702, Rev. Chicago Code, 1931) declared unsafe and insanitary buildings to be nuisances by an enactment that every building or structure “which is in an insanitary condition, or in an unsafe or dangerous condition or which in any manner endangers the health or safety of any person or persons is hereby declared to be a public nuisance.”

The following are the departments of the City of Chicago concerned with the repair or demolition of buildings:

(a) Section 201.06, chap. 2 of the New Building Ordinance of the City of Chicago authorizes the Commissioner of Buildings after notice

to repair, and failure to comply, to direct the Commissioner of Public Works to tear down any building which is in such unsafe condition as to endanger life or property;

(b) Sections 2236 and 2237 of the Revised Chicago Code of 1931 gives similar powers to the Board of Health in the case of insanitary buildings which menace the public health;

(c) Section 172, Revised Chicago Code of 1931, as amended August 2, 1935 C. J. 1935-36 authorizes the Commissioner of Public Works to tear down buildings with labor furnished by the Illinois Emergency Relief Commission or any agency of the Federal Government. Under this power the Commissioner of Public Works, with the cooperation of the WPA, has been and still is engaged in the demolition of old, unsafe and dilapidated buildings where the consent of the owners thereof has been secured.

From the foregoing enumeration of the powers of the city in the matter of eliminating unsafe, insanitary and dilapidated buildings and by virtue of the express power granted by Section 4(k) of the Housing Cooperation Act, we are of the opinion that the City Council may legally enter into this agreement.

LOCAL CONTRIBUTION TO PROJECT

(No. 10112—*Executive Secretary, Chicago Housing Authority*—N. N. E.—October 4, 1939—3 pp.)

Under State statute, exemption from payment of special assessments may not be included as a part of local annual contribution to a housing project.

Citations:

Statutes: Revenue act of 1872 as amended, sec. 2 (12).

Ill. Laws (1st and 2nd Sp. sess. 1938), pp. 31 to 38, 67, 68.

CONDEMNATION BY HOUSING AUTHORITY

(No. 10015—*Chairman, Subcommittee on Housing*—A. F. G.—May 22, 1939—4 pp.)

The Chicago Housing Authority could legally acquire by condemnation such property as it deemed necessary for a slum clearance or low rent housing project, but it could not legally dispose of any part of such lands to a private corporation for a purpose foreign to that for which it was condemned.

Citations:

Constitution: Illinois, art. 9, sec. 12.

Statute: Housing Authorities act, secs. 2, 9, 24, 25.

Case: Krause v. Peoria Housing Authority, 370 Ill. 356 (1939).

OPINION OF FOREGOING SYNOPSIS

This will acknowledge your letter of May 19, 1939 requesting opinions as follows:

"1. Whether the existing authority of the Chicago Housing Author-

ity to issue bonds might be invoked for the purpose of raising money to acquire property through condemnation, part of the property so acquired to be used probably for private construction.

2. Whether the debt limitation imposed on cities extends to the issuance of bonds by the Chicago Housing Authority."

The Chicago Housing Authority is a municipal corporation. A municipal corporation can exercise only such powers as are expressly granted to it by the legislature which creates it and such implied powers as are reasonably necessary to carry into effect the powers expressly granted.

By Section 2 of the Housing Authorities Act the Chicago Housing Authority is vested with "All power necessary or appropriate in order that they may engage in low rent housing and slum clearance projects;" by Section 24 of the same act they are prohibited from operating any such project for profit, or as a source of revenue to a city, village, incorporated town or county. By Section 25 they are limited in tenant selection to persons of the low income group. By Section 9 the Authority may take or acquire the fee of any real property in its area of operation directly from the owner or may acquire the same by the exercise of Eminent Domain in the manner provided by law. We believe under this section the Chicago Housing Authority could acquire by condemnation such property as it deemed necessary for a slum clearance or low rent housing project.

However your first question implied that the Housing Authority condemn property only part of which is to be used for the public purpose for which it was created the balance to be disposed of to a private corporation for a purpose foreign to that for which it was condemned. We do not think this legally can be done.

Such a proceeding would be analogous to the Chicago Park District acquiring by condemnation a large tract of land near the Chicago Loop for the establishment of a park, and after acquiring such land to abandon the park project and sell the land to a Public Service Building Corporation for the erection of such buildings as it is authorized to build.

Under the law of Eminent Domain when property is acquired for a public purpose and the use of that property for the purpose for which it was condemned has been abandoned, title to such property then becomes vested in the owners from which it was taken.

The answer to your second question is no. The Housing Authorities Act expressly provides in Section 11 that "The bonds and other obligations of an Authority shall not be a debt of any city, village, incorporated town, county, the State or any political subdivision thereof * * * and are not payable out of any funds other than those of said Authority" and they are explicitly declared not to constitute "an indebtedness within the meaning of any constitutional or statutory debt limitation or restriction."

In the case of *Krause v. Peoria Housing Authority*, 370 Ill. 356 the appellants contended that the bonds to be issued by the Peoria Housing Authority are obligations of the city of Peoria and are subject to Section 12 of Article 9 of the State Constitution. The court said at page 370:

"We cannot agree with this contention. * * * While the provision that the bonds are not to constitute an indebtedness within the meaning of any constitutional debt limitation is not binding on us, it is clear that the debt here created is not one coming within the constitutional limitation. We have held that obligations which are secured only against the revenues of specific revenue producing properties are not within the constitutional restrictions on municipal indebtedness" (Citing cases).

ACQUISITION AND SALE OF LAND BY HOUSING AUTHORITY

(No. 10004—Chairman, Subcommittee on Housing—A. F. G.—May 15, 1939—5 pp.)

The Chicago Housing Authority does not have power to acquire economic blighted areas and sell such land to private corporations, as it can acquire land only for purposes of slum clearance and for low rent housing projects.

Citations:

Statutes: Housing Authorities act, secs. 2, 11, 14, 24, 25.

House Bill 759 (1939) Ill. Legislative session.

Case: Krause v. Peoria Housing Authority, 370 Ill. 356 (1939).

OPINION OF FOREGOING SYNOPSIS

Your committee at its meeting May 12, 1939 propounded several questions and requested this office to give opinions thereon. The questions were not reduced to writing but we understood them to be and our opinion is based on the following: Has the Chicago Housing Authority power to acquire property and clear slums independent of its power to construct, maintain and operate low rent housing projects? We think it has, but there is no provision in the Act for financing slum clearance independent of the construction of low rent housing projects. Before a local housing authority can be created, the State Housing Board, before it issues a certificate to the presiding officer of a city, village, town or county for the creation of such authority, must find "(a) that unsanitary or unsafe inhabited dwelling accommodations exist in such city, village, incorporated town or county, or (b) that there is a shortage of safe or sanitary dwelling accommodations in such city, village, incorporated town or county available to persons who lack the amount of income which is necessary (as determined by said Board) to enable them without financial assistance to live in decent, safe and sanitary dwellings without overcrowding." (Section 2, Housing Authorities Act.) We think it follows that the housing authority thus created would have power to do either or both of the things which the State Housing Board's findings made necessary its creation.

We understood your next query to be: Can the powers which H. B. 759 provide may be exercised by Public Service Building Corporations be exercised by the Chicago Housing Authority? We do not think so. The Chicago Housing Authority is a municipal corporation vested with "all powers necessary or appropriate in order that they may engage in low rent housing and slum clearance projects;" (Section 2, Housing Authorities Act.) Section 24 of the same Act provides that "no housing Authority shall construct or operate any such project for profit, or as a source of revenue to a city, village, incorporated town or county." By Section 25 they are limited in tenant selection to persons of the low income group. All of its acts in relation to the acquisition of real property and the undertaking of any construction of a project is subject to the approval of the State Housing Board. (Section 14, Housing Authorities Act.) Its property is exempt from taxation (*Krause v. Peoria Housing Authority*, 370 Ill. 356.)

The type of corporations provided for in H. B. 759 and the powers vested in them is entirely different. That bill provides for the creation of private business corporations with stockholders whose building activities are not limited to providing housing facilities either of low rent char-

acter or otherwise. By Section 2 of the bill they may devote areas acquired by them "to their highest and best use." There is no limit to character of buildings they may erect or to the profits they may earn. After acquiring more than 50% of an area by purchase, agreement or option they may acquire the remainder by the exercise of Eminent Domain. The bill provides for a large measure of control over their activities by the State Housing Board.

The question implied in Mr. Kramer's statement may be thus stated: Can the Chicago Housing Authority acquire by purchase or condemnation these large blighted and slum areas, use such portions as are needed for constructing low rent housing projects and sell or lease the remainder to private industry for the purposes set out in H. B. 759?

There is in such a proposal both a financial and a legal problem. The Chicago Housing Authority has no tax levying power. Its power to finance undertakings is to be found in Section 11 of the Housing Authorities Act which is as follows:

"An Authority shall have power to issue bonds from time to time in its discretion to finance in whole or in part the cost of acquisition, purchase, construction, reconstruction, improvement, alteration, extension or repair of any project or undertaking hereunder. An Authority shall also have power to issue refunding bonds for the purpose of paying or retiring bonds previously issued by it. An Authority may issue such types of bonds as it may determine by resolution, including bonds on which the principal and interest are payable; (a) exclusively from the income and revenues of the housing project financed with the proceeds of such bonds, or with such proceeds together with a grant from the Federal Government or any political subdivision of the State in aid of such project; (b) exclusively from the income and revenues of certain designated housing projects of such Authority whether or not they were financed in whole or in part with the proceeds of such bonds; or (c) from its revenues generally. Any of such bonds may be additionally secured by a pledge of any revenues of any housing project, projects or other property of the Authority."

We do not believe the Chicago Housing Authority could financially or legally do what Mr. Kramer suggests. It can only acquire land for slum clearance or for low rent housing projects. We think there is a distinction between "slum" areas and "blight" areas as used in H. B. 759. The former is an area in which large numbers of persons live in overcrowded, unsanitary and substandard dwellings, without proper light, ventilation or recreational facilities, under squalid conditions and sordid environment. On the other hand the "blight" areas which the bill seeks to eliminate are areas generally vacant which have become obsolete for the purposes for which they formerly were used and from which the buildings generally have been removed. The rehabilitation of blight areas is an economic problem, not a social one. We doubt if the Chicago Housing Authority could legally purchase land not needed or useful for its corporate purpose and sell the same to a private corporation for a purpose foreign to the purpose for which the Chicago Housing Authority was created namely, the rehabilitation of decadent real estate. Financially we do not believe bonds issued for this purpose by the Chicago Housing Authority payable solely out of revenue, without governmental subsidy or corresponding investment in the project would be readily salable.

Even by adhering strictly to its statutory power, we do not believe as a practical proposition that the Chicago Housing Authority could function without the financial aid and assistance of the United States Housing Authority.

CONTRACTS PREPARATORY TO SECURING LAND FOR HOUSING PROJECT

(No. 10157—*Chicago Housing Authority*—N. N. E.—December 11, 1939—1½ pp.)

The Chicago Housing Authority may legally contract with a realtor for procuring options, and may legally contract with a title and trust company for title information and guarantee policies on land for a low rent housing project.

Citation: IRS '39, 67½: 8, 9.

WAIVER OF FEES ON BUILDING PERMITS TO HOUSING AUTHORITY

(No. 10108—*Commissioner of Buildings*—N. N. E.—October 2, 1939—3 pp.)

Where the City Council, pursuant to State statute, has enacted an ordinance authorizing the Mayor to enter into a cooperation agreement with the Chicago Housing Authority for the development of a specified housing project, and the agreement thereafter executed stipulates a waiver by the City of building and inspection fees, the Commissioner of Buildings should issue free of charge to the Chicago Housing Authority all permits necessary for the project, even though the City Council order directing him to issue same does not specify a waiver of fees.

Citations:

Statute: IRS '37, 67½: 31.

Ordinances: Coun. J. (1938-39), pp. 870, 871, 7211.

Opinion No. 10075 of August 9, 1939 to the President of the Board of Health holds substantially the same as the above opinion.

APPROVAL OF PLANS OF IDA B. WELLS PROJECT

(No. 10117—*Board of Health*—N. N. E.—October 13, 1939—3 pp.)

The Board of Health should require no fee for examining plans of the Ida B. Wells Low Cost Housing Project. If any violations of ordinances exist in the plans, other than the deviations authorized in the cooperation agreement, authority therefore should be secured from the City Council before the plans are approved.

Citations:

Statute: IRS '39, 67½: 31.

Other reference: Coun. J. (1939-40), p. 871 (Order).

GROUPING OF FEDERAL HOUSING BUILDINGS UNDER ONE FUMIGATING PERMIT

(No. 9902—President, Board of Health—R. N.—October 24, 1938—2 pp.)

Contiguous Federal Housing Project buildings may not be grouped under one fumigating permit. A separate permit must be obtained for each building.

Citations: Code '31: 3443c, 3443h, par. (b).

LIENS ON IDA B. WELLS PROJECT

(No. 10134—Chicago Housing Authority—A. F. G.—November 13, 1939—4 pp.)

Before making payments on contracts, the Chicago Housing Authority may in its discretion demand releases or receipts from all persons performing work or supplying materials, or it may waive the right to demand such releases or receipts.

No contractor's lien can attach to the premises of the Ida B. Wells Low Cost Housing Project, but a subcontractor retains the right of lien against any money which may be due to the contractor from the Authority.

Citations:

Statutes: IRS '39, 82: 21, 23.

Cases: Central Lime & Cement Co. v. Leyden-Ortseifen Co. and Sanitary District, 245 Ill. App. 48 (1927).

Nelson v. Urban, 236 Ill. App. 447 (1925).

Northside Sash and Door Co. v. Goldstein, 286 Ill. 209 (1919).

PURCHASES FOR IDA B. WELLS PROJECT

(No. 10131—Chicago Housing Authority—N. N. E.—November 9, 1939—4½ pp.)

The Ida B. Wells Low Cost Housing Project, owned by the Chicago Housing Authority, comes within the operation of the 1937 "act in relation to the purchase of materials, products, supplies, and provisions for certain institutions in this State." The Chicago Housing Authority, in considering bids for materials and supplies (other than fuel, stationery and printing paper) to be used by the Project, must follow the procedure set forth in said act.

Citations:

Statutes: Ill. Laws (1937), p. 1127.

IRS '39, 29: 34, 37, 40.

Housing Authorities act.

Case: People v. Wallace, 291 Ill. 465 (1920).

Other reference: Black on Interpretation of laws (1911), p. 337.

OPINION OF FOREGOING SYNOPSIS

This is to acknowledge receipt of your communication dated October 31, 1939. In your letter you state, among other matters, that the Local Authority "is issuing specifications for the purchase of refrigerators and gas ranges for the Ida B. Wells Low-Cost Housing Project."

You request an opinion of the Corporation Counsel concerning whether or not the Chicago Housing Authority is "an institution under the meaning of this Act, and would, therefore, the same procedures appertain to the submitting of bids for our purchases?"

The Act referred to is "An Act in relation to the purchase of materials, products, supplies and provisions for certain institutions in this State." (Approved June 14, 1937. L. 1937, p. 1127.) The Act reads as follows:

"Sec. 1. Every officer or other person in charge of the purchase of materials, products, supplies and provisions for any institution owned or operated by the State or by any municipal corporation or political subdivision thereof, shall for the purpose of determining the lowest bidder in the case where bids or proposals are requested for materials, products, supplies and provisions for any institution owned or operated by the State (other than fuel, stationery and printing paper for such State institutions) or by any municipal corporation or political subdivision thereof, add an amount equal to the tax which a bidder subject to the 'Retailers' Occupation Tax Act,' approved June 28, 1933, as amended, would be required to pay on the gross receipts of such bid, pursuant to said Act, to the amount of the bids submitted by bidders who are not liable for such tax. If any of such bids shall be the lowest and best bid, quality considered, after such amount is added, then the contract shall be awarded in accordance with the bid originally submitted." (Ill. Rev. Stats., 1939, chap. 29, par. 34.)

The term "institution" is not defined in this Act.

The word "institution" is defined in Section 2 of "An Act concerning the use of Illinois mined coal in certain plants and institutions." (Filed July 13, 1937, L. 1937, p. 1207; Ill. Rev. Stats., 1939, chap. 29, par. 37.) Also, the meaning of the term "institution" is set forth in Section 1 of "An Act concerning the purchase by Illinois institutions of commodities grown or produced in other States." (Filed August 3, 1939. L. 1939, p. 1155; Ill. Rev. Stats., 1939, chap. 29, par. 40.)

In almost the identical language the term "institution" is defined in both of the foregoing statutes as those institutions maintained by the State of Illinois or any political subdivision thereof or any municipal corporation.

The question presented for our consideration is whether the term "institution" as defined above, has reference to the word "institution" as used in the Act under advisement.

An examination of Sections 1 and 2 of the Act dealing with Illinois mined coal for public institutions, and Sections 1 and 2 of the Act concerned with public purchases in other States by Illinois institutions, above referred to, shows an intention on the part of the legislature to make said Acts applicable only to those institutions which are maintained and supported in whole or in part from funds received from the State of Illinois or any political subdivision thereof or any municipal corporation.

It is a well known rule that statutes which are in "pari materia"—that is, statutes which relate to the same subject or have the same object, although they were enacted at different times, should be construed together

to determine the legislative intent. (*The People v. Wallace*, 1920, 291 Ill. 465.) However, Black on Interpretation of Laws (1911) p. 337, states:

"But laws which relate to entirely different subjects are not in *pari materia*; and an act is not in *pari materia* with another, although it may incidentally refer to the same subject, if its scope and aim are distinct and not connected with the former statute. * * *

The Act under consideration differs from the foregoing Acts above discussed to the extent that said Act is concerned only with those institutions which are "owned or operated by the State or by any municipal corporation or political subdivision thereof." No mention is made in said Act that such institutions must be maintained or supported in whole or in part by public funds received from the State of Illinois or any of its political subdivisions or any municipal corporation.

The title to the Ida B. Wells Low-Cost Housing Project vests in the Chicago Housing Authority, a municipal corporation existing under and by virtue of the Housing Authorities Act (Ill. Rev. Stats., 1939, chap. 67½). While the City of Chicago furnishes certain services to the Project for which it receives compensation in the form of service charges, neither the State of Illinois nor any political subdivision thereof or any municipal corporation contributes any public funds for the maintenance and support of the aforesaid Project.

We are of the opinion that the meaning of the term "institution," as defined in the Acts herein referred to, has no application to the Act which is the subject matter of this inquiry. Further, we are of the opinion that the Ida B. Wells Low-Cost Housing Project comes within the operation of said Act, and the Chicago Housing Authority, in considering bids for materials, products, supplies and provisions (other than fuel, stationery and printing paper) to be used by the Project, must follow the procedure set forth in said Act.

PAYMENT OF "SALES TAX" BY CHICAGO HOUSING AUTHORITY

(No. 9766—*Chairman, Chicago Housing Authority*—A. F. G.—January 28, 1938—2½ pp.)

The Chicago Housing Authority is not subject to the retailers' occupation tax or "sales tax" in the sense that it is required by law to pay the tax, but if the amount of the occupation tax which the retailer is required to pay is included in the selling price, or itemized as a part of the selling price, the Chicago Housing Authority would have to pay the tax.

Citations:

Statute: Retailers' Occupation Tax act, sec. 2.
Case: Winter v. Barrett, 352 Ill. 441 (1933).

PAYMENT OF PUBLIC UTILITIES GROSS RECEIPTS TAX BY CHICAGO HOUSING AUTHORITY

(No. 9798—*Chairman, Chicago Housing Authority*—A. F. G.—March 21, 1938—3½ pp.)

The Chicago Housing Authority does not rebill tenants of the hous-

ing projects operated by it for gas and electricity furnished them and has no statutory power to engage in the business of selling water, gas, or electricity. In supplying these commodities to tenants of the housing projects, it is not engaging in "business," but is performing the "governmental function" for which it was created. The Authority is the user or consumer of all the gas and electricity purchased for the operation of the housing projects, and thus is not subject to the public utilities gross receipts tax.

Citations:

Statute: Public Utilities Gross Receipts Tax act, sec. 2.

Other reference: Department of Finance Rules and Regulations, art. 14.

DETERMINATION OF INCOME OF HOUSING PROJECT TENANTS

(No. 10077—*Chicago Housing Authority—N. N. E. & A. F. G.—August 11, 1939—4 pp.*)

The Chicago Housing Authority, in determining what constitutes a deductible item in arriving at the income of a tenant residing in a housing project leased from the United States Housing Authority, is bound by the United States Housing Authority's definition of the term "net income," in the absence of any statutory or judicial rulings to the contrary.

Citations:

Statutes: United States Housing Authority (1937), secs. 2, 8.

Other reference: Bulletin of USHA policy and procedure No. 22.

CONTROL OVER NEWSPAPER OF HOUSING TENANTS

(No. 9960—*Executive Secretary, Chicago Housing Authority—A. F. G.—February 24, 1939—2 pp.*)

The Chicago Housing Authority has no right to interfere with the by-laws of an organization created by residents of a housing project for the purpose of publishing a community newspaper, as such is to be the property of the tenants and controlled and operated by them for their mutual benefit. The Authority has no power to control the affairs or interfere with the social or community activities of its tenants.

B. FEDERAL RELATIONSHIPS

WPA PROJECT PROPOSAL AS TO FINANCIAL RESPONSIBILITY

(No. 9913—City Comptroller—J. F. G.—November 19, 1938—2 pp.)

The paragraph in the WPA project proposal form 301 to the effect that:

"It is agreed that the Works Progress Administration is under no obligation to initiate operations under this proposal, if it is approved, nor to complete the project if placed in operation. Further, in consideration of expenditures from Federal funds to be made on the project, it is agreed, if the proposed work is undertaken, that the sponsor will finance such part of the entire cost thereof as is not to be supplied from Federal funds"

will obligate the City to finance such part of the entire cost of the project as is not to be supplied from Federal funds, rather than the amount of money which the City in its application offers to expend as its part of the entire cost of the project.

WPA PROJECT PROPOSAL AS TO AVAILABILITY OF FUNDS

(No. 9918—Commissioner of Public Works—W. V. S.—November 29, 1938—3 pp.)

The sponsor's agreement and certificate (item 36) of the WPA project proposal form 301, revised as of August 15, 1938, may be subscribed to by the City without the imposition of additional liability when it provides that:

"The sponsor agrees that no work will be undertaken on any useful economic unit until the sponsor's share of funds for the unit is available."

The fifth paragraph of this item should be qualified by the inclusion of the clause that has accompanied project proposals made upon the old form, providing that:

"It is understood that the liability of the sponsor, under this agreement is to share in the use of its funds with Federal funds at the proportionate rate indicated by the project proposal, and that should the required Federal funds not be available, the sponsor will, as appropriations become available, place the project, if incomplete, in such condition that the work will not be a discredit to the sponsor or to the Works Progress Administration."

Since project proposals to be executed in the future contemplate the institution of actual operations in 1939, the clause in this item dealing with the construing of the subject matter as a pledge of the sponsor to make contributions should be changed to read as follows:

"Nothing herein contained shall be construed as a pledge of the sponsor to make any of the contributions indicated, unless funds for the purpose are or become available by appropriation or otherwise."

Opinion 9911 to the Public Vehicle License Commissioner, dated November 17, 1938 and Opinion 9915, to the Commissioner of Public Works, dated November 23, 1938, hold substantially the same.

WPA AGREEMENT AS TO NON-LIABILITY OF FEDERAL GOVERNMENT

(No. 9923—*Commissioner of Public Parks*—W. V. S.—December 2, 1938—1½ pp.)

The requirement of WPA that the City as sponsor of a new building demolition project agrees that:

"No work shall be started until the sponsor has signed an agreement that it assumes all responsibility for public liability or property damage which may arise in the prosecution of this project and will save the Federal government harmless with respect to any such responsibility,"

is merely an agreement to save harmless the Federal government from public liability or damage arising in connection with the operation of the project, and does not operate to extend or alter the liability of the City in connection with project operations.

USE OF STATE FUNDS FOR WPA PROJECTS

(No. 10119—*Commissioner of Public Works*—A. F. G.—October 23, 1939—3½ pp.)

The Commissioner of Public Works may properly sign the application to the Illinois Emergency Relief Commission requesting a grant of funds for the purpose of providing employment on WPA projects for persons on relief rolls.

USE OF VEHICLE TAX FUND FOR WPA STREET AND SEWER PROJECT

(No. 9904—*City Comptroller*—W. V. S.—November 4, 1938—4 pp.)

The City may use a portion of the vehicle tax fund as its cash contribution toward a WPA project involving the rehabilitation and exten-

sion of sewers and the reconstruction and resurfacing of the streets in which the sewers are located, as such work is within the purposes for which the vehicle tax fund may be employed.

Citations:

Statute: IRS '37, 24: 65.95.

Other references: Op. Corp. Coun. (1924-25), pp. 36, 408, v. 15, p. 37, v. 16, p. 417.

DEMOLITION OF UNSAFE BUILDINGS WITH WPA LABOR

(No. 9976—Commissioner of Public Works—A. J. R.—April 8, 1939—7 pp.)

The City Council has declared an unsafe or unsanitary building to be a nuisance and therefore the City has power to abate such nuisances.

The Department of Public Works has power by ordinance to sponsor a Federal Works Progress Administration project for the demolition of unsafe or unsanitary buildings by WPA labor when the owner consents to such demolition and agrees that the salvage should be given to the City and further agrees to keep the land vacant for one year after demolition.

Citations:

Statutes: USCA Title 42, par. 1410.

4 US Mason's Code, p. 1256.

Ill. Laws (1938), sec. 4, p. 31.

Ill. Stat. Ann. (Smith-Hurd), c. 24, sec. 185.

Ordinances: Code '31: 1702.

Coun. J. (1935-36), p. 549.

Cases: Laugel v. City of Bushnell, 197 Ill. 20 (1902).

Sings v. City of Joliet, 237 Ill. 300 (1908).

People v. City of Chicago, 260 Ill. 150 (1913).

OPINION OF FOREGOING SYNOPSIS

By your letter of March 16, 1939 and supplementary letter of March 17, 1939 you requested an opinion as to whether the City of Chicago "has legal authority, and particularly this department, to sponsor a project for demolition, and to demolish buildings." Your letter of March 16 informs me that the City of Chicago, Department of Public Works, Bureau of Engineering, Construction Division, sponsors and is now operating City WPA Demolition Project Number 30095. The letter also informs me that the work includes wrecking public buildings and privately owned buildings in accordance with the Presidential Approval for this project, and in accordance with City ordinances, as well as in accordance with rules established by the Works Progress Administration.

Documents accompanying your letter of March 16th inform me that in each case, before a building is demolished, the consent of its owner to its demolition is obtained in the form of an agreement in and by which, in consideration of the service to be rendered by the Department of Public Works of the City of Chicago in wrecking the building, the owner permits the City to demolish the building, "conveys to the said department of the City of Chicago all materials, fixtures and salvage resulting from such demolition," and accepts the condition set forth in the contract.

Most important of the conditions, and the only ones which need be mentioned here, are a stipulation that the wrecking is to be done by labor furnished by the Works Progress Administration, or other similar authority established by Act of Congress, and a stipulation that as proof that the requested demolition is not for the direct benefit of the owner or to secure immediate enhancement of property value, the owner agrees to leave the property vacant for not less than one year.

Your letter of March 16th mentioned the situations which have arisen occasioning the necessity for this opinion and they make it unnecessary to consider herein any questions concerning the validity or construction of any law of the United States or rule or regulation of the Works Progress Administration.

Section 10 of the United States Housing Act of 1937 (USCA, Title 42, paragraph 1410; 4 Mason's Code, page 1256) contains the following proviso:

"* * * Provided. That no annual contributions shall be made, and the Authority shall enter into no contract guaranteeing any annual contribution in the connection with the development of any low-rent-housing or slum-clearance project involving the construction of new dwellings, unless the project includes the elimination by demolition, condemnation, and effective closing, or the compulsory repair or improvement of unsafe or insanitary dwelling situated in the locality or metropolitan area, substantially equal in number to the number of newly constructed dwellings provided by the project; except that such elimination may, in the discretion of the Authority, be deferred in any locality or metropolitan area where the shortage of decent, safe, or sanitary housing available to families of low income is so acute as to force dangerous overcrowding of such families."

It is, of course for the purpose of complying with this proviso of the United States Housing Act that your work of demolition is being carried on.

Section 4, (i), (j) and (k) of an act of the General Assembly of the State of Illinois entitled "An Act in relation to aid of housing projects and cooperation with housing authorities and the Federal government by municipal corporations, political subdivisions and other public bodies of this State," filed July 13, 1937, as amended by an act approved July 13, 1938 (Laws of Illinois, 1938, page 31) provides:

"(i) Do any and all things, necessary or convenient to aid and cooperate in the planning, undertaking, construction, reconstruction, improvement, alteration, repair or operation of such housing projects;

"(j) Cause service of the character which such State Public Body is otherwise empowered to furnish to be furnished to a housing authority;

"(k) Enter into agreements with respect to the exercise by such State Public Body of its powers relating to the repair, elimination or closing of unsafe, insanitary or unfit dwellings;"

For the purpose of this opinion I shall regard the foregoing provisions as far as they relate to the "repair, elimination or closing of unsafe, insanitary or unfit dwellings" as not creating a new power in the City of Chicago but providing merely for a new exercise of powers already possessed.

By Section 185 of the Cities and Villages Act of the State of Illinois (Smith-Hurd Ill. Ann. Stat., chapter 24, sec. 185), which in its present form has been in effect since 1905, it is provided that:

"The City Council shall, by ordinance, be empowered to declare

and define nuisances and abate the same, and shall have the power to regulate the location and conduct of hospitals and infirmaries."

The extent of the power to declare and abate nuisances is, of course, determined, in one aspect, by the scope of the definition which the courts have given to "nuisances."

In *Laugel v. City of Bushnell*, 197 Ill. 20, at p. 26 (1902) the Supreme Court of Illinois said:

"* * * Nuisances may thus be classified: *First*, those which in their nature are nuisances *per se* or are so denounced by the common law or by statute, *second*, those which in their nature are not nuisances but may become so by reason of their locality, surroundings or the manner in which they may be conducted, managed, etc.; *third*, those which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds."

What the Supreme Court said in the *Laugel* case was approved in *Sings, et al. v. The City of Joliet*, 237 Ill. 300, at 309 (1908) and in *The People, ex rel. v. The City of Chicago*, 260 Ill. 150, at 152 (1913).

In the latter case the Supreme Court held that:

"* * * The power granted to cities in relation to nuisances authorizes the city council to declare those things falling within the first and third classes to be nuisances, but as to those things falling within the second class the only power the city has is to declare such of them to be nuisances as are so in fact. * * *"

A building which is unsafe or insanitary is clearly within the third class of nuisances, even if it could be said that it is not within the first.

Acting within its powers as to declaring and abating nuisances the City of Chicago, through its council, has by ordinance (Revised Chicago Code, 1931, sec. 1702, page 547) declared unsafe and insanitary buildings to be nuisances, by an enactment that every building or structure "which is in an unsanitary condition, or in an unsafe or dangerous condition or which in any manner endangers the health or safety of any person or persons, is hereby declared to be a public nuisance." This ordinance is still in full force and effect.

An unsafe or insanitary building being thus a public nuisance the power of the city to abate it exists. The question whether abatement must be limited to measures short of demolition is in each instance obviated by your invariable practice of obtaining the consent of the owner. This consent also removes the necessity of notice to the owner to abate, of allowance of time and opportunity to the owner to effect abatement, and of resort to equity proceedings which might otherwise be necessary in certain cases. In each case your operations are valid as against the owner.

No occasion for complaint by a taxpayer arises because the demolition is accomplished by the use of WPA labor and the donation to the city of salvage which is used on other public work is an advantage beneficial to the taxpayers of the city.

The contractual requirement that the land remain vacant for not less than one year is a safeguard against imposition by an owner who might seek to prepare his land for new construction by permitting the city to demolish an existing building or structure.

Your inquiry relates also to the power of your department to carry on this work. This question is conclusively answered favorably to your power in the matter by the provisions of an ordinance of August 2, 1935 (Coun-

cil Proceedings, 1935-1936, page 549) which makes the following provisions concerning powers of the Commissioner of Public Works "as to Municipal Work Shops, Storehouses and Wrecking Buildings;"

"He may engage in the work of wrecking buildings or structures either public or private. Such work may be performed by the shop and construction forces under his direction or by labor supplied by the Illinois Emergency Relief Commission or by any other agency of the State of Illinois or by any agency of the United States. He shall have authority to trade or exchange salvage from wrecking operations for tools, materials, services and equipment necessary to carry on such wrecking operations upon competitive bids without advertising."

For the reasons herein stated it is my opinion that the demolition projects carried on by your department are, in the manner in which they are carried on, entirely within the powers of the City of Chicago and of your department and are in full compliance with the law.

ACKNOWLEDGMENT OF "CONSENT AGREEMENT" USED IN DEMOLITION PROGRAM

(No. 9967—Commissioner of Public Works—A. F. G.—March 20, 1939—2 pp.)

Acknowledgment of a "consent agreement" used in the City's demolition program is unnecessary when the agreement provides that the owner of a building no longer useful offers it for demolition and the Department of Public Works consents to wreck the building with WPA labor in consideration of the donation to the department of the salvaged material, as such agreement does not constitute such a conveyance of title to real estate as to require the statutory form of acknowledgment.

The title to real estate is not involved under this agreement as only the salvaged material from the wrecked building changes hands and that becomes personalty when severed from the land.

PAINTING ELEVATED RAILROAD COLUMNS BY WPA

(No. 10133—Commissioner of Public Works—A. F. G.—November 13, 1939—4 pp.)

The proposed project of the Works Project Administration for painting the columns of the elevated railroads in the Loop is in the interest of the public and not for private benefit because the City is primarily liable for the safety of the streets and may not be able to recover on the elevated railroad companies' indemnifying bonds as the sureties have long since died and the elevated railroad companies are in receivership.

Citations:

Ordinances: Hoover, Special Ordinances (1915), pp. 1207, 1298, 1370, 1378.
Case: Valuch v. Rawson, 270 Ill. App. 583 (1933).

RFC LOAN FOR NAVY PIER REHABILITATION PROJECT

(No. 9921—Mayor—W. V. S.—November 30, 1938—3 pp.)

The RFC may lawfully make a loan to the City in connection with the Navy Pier PWA rehabilitation project, and may lawfully enter into a contract with the City for repayment of the loan from the revenue derived from the operation of the new facilities.

The City is authorized to enter into a contract with RFC whereby the revenue derived from the new facilities is pledged to RFC to secure repayment of the loan made by it.

Citations:

- Statutes: 15 USCA 605b (Reconstruction Finance Corporation act, as amended April 13, 1938, sec. 5d).
Ill. Laws, 60th Gen. Ass., 1st and 2nd Sp. sess. 1938, p. 17 (Participation in Federal Works Projects).

OPINION OF FOREGOING SYNOPSIS

Mr. Whiting stated yesterday that it would be helpful if the views of this department concerning the financing of the project for the rehabilitation of the Municipal Pier were expressed in a formal opinion, and in accordance with your request that we cooperate fully with the Association of Commerce Committee we are transmitting this opinion.

As we understand it, the present status of the negotiations is as follows: The PWA has expressed a willingness to make a grant of \$575,000, but is apparently unwilling to loan the balance of \$700,000. Secretary Ickes suggested that an effort be made to secure a loan of \$700,000 from the Reconstruction Finance Corporation. The proposed loan was discussed with RFC upon the assumption that revenue bonds would be issued to evidence the City's obligation to repay the loan. The question then arose as to whether or not such bonds might validly be issued without a referendum, and local bond counsel named by RFC have indicated that they are unwilling to approve such bonds unless a referendum is had. Apparently, therefore, unless RFC relaxes its requirement the project may not be financed by the issuance of revenue bonds.

In our opinion, however, if the RFC sees fit to do so it may aid in financing the project to the extent of a loan of \$700,000 without the issuance and delivery of revenue bonds. Section 5d of the Reconstruction Finance Corporation Act as amended by an act approved April 13, 1938 provides:

*"For the purpose of maintaining and promoting the economic stability of the country or encouraging the employment of labor the Corporation is authorized and empowered, under such terms, conditions, and restrictions as the Corporation may determine, to make loans to, or contracts with, States, municipalities, and political subdivisions of States, with public agencies and instrumentalities of one or more States, municipalities, and political subdivisions of States, and with public corporations, boards, and commissions, to aid in financing projects authorized under Federal, State, or municipal law, such loans or contracts to be made through the purchase of their securities, or otherwise, and for such purpose the Corporation is authorized to bid for such securities. * * **" (Emphasis supplied.)

The language of this section of the Reconstruction Finance Corpora-

tion Act makes it plain that the Corporation in making loans to municipalities is not restricted to the purchase of municipal securities; such loans may, we believe, be made by the Corporation upon the contract of the municipality to repay from revenue to be derived from the operation of the project even though no marketable securities evidencing the loan are issued.

By an act of the First Special Session of the 60th General Assembly of Illinois, approved July 6, 1938, municipalities in Illinois are authorized to apply for and accept grants and loans from and contract with the United States Government, or any department or agency thereof, for the purpose of aiding in financing public works projects, and are also authorized to pledge the revenue to be derived from any such projects to secure repayment of the loan. (Session Laws of Illinois, 60th General Assembly, First and Second Special Session, 1938, page 17.)

From a consideration of these two statutes, we are of the opinion that RFC may lawfully make a loan to the City in connection with the Pier Project, and may lawfully enter into a contract with the City for repayment of the loan from the revenue derived from operation of the new facilities. We are further of the opinion that the City is authorized to enter into a contract with RFC whereby the revenue derived from the new facilities is pledged to RFC to secure repayment of the loan made by it.

Opinion 9914 to the Commissioner of Public Works, dated November 21, 1938, holds substantially the same.

SOCIAL SECURITY CARD OF CITY EMPLOYEE

(No. 9900—*Superintendent of Equipment, Department of Streets and Electricity*—A. F. G.—October 21, 1938—1½ pp.)

The City should deliver to one of its employees the social security card which it has received for him, but may disregard that part of the notice accompanying the card instructing the City to make a record of the card, as the City is expressly excepted from the operation of the Social Security act.

Citation: 42 USCA 1011 (Social Security act).

C. RELATIONSHIPS WITH OTHER GOVERNMENTS

PERMIT FOR WATER TUNNEL UNDER LAKE SHORE WHICH HAS ERODED

(No. 9845—Commissioner of Public Works—A. A. S.—June 17, 1938—
4½ pp.)

The City should procure a permit from the State to drive a water tunnel under the line of Lake Park avenue between 71st and 75th streets as, the shore line having eroded to a point west of the west line of Lake Park avenue, the street has reverted to the State. The title to land bordering on navigable waters is lost to its owners by erosion and vests in the State. This loss is not permanent if the land may be returned by accretion or by the exclusion of the water by artificial means.

No permit from the Federal government will be necessary to build the tunnel, as it will not interfere with the rights of the public to use the lake for fishing or navigation, nor will the consent of owners of property bordering on the lake between 71st and 75th streets have to be obtained as they have only the riparian rights of ingress and egress from the water of the lake over their property.

Citations: *People v. Kirk*, 162 Ill. 138 (1896).
Revell v. People, 177 Ill. 468 (1899).
Cobb v. Commissioners of Lincoln Park, 202 Ill. 427 (1903).
Commissioners of Lincoln Park v. Fahrney, 250 Ill. 256 (1911).

OPINION OF FOREGOING SYNOPSIS

We acknowledge receipt of your letter of May 24, 1938, in which you request an opinion as to whether or not it will be necessary for the city of Chicago to procure a permit from the State and Federal Government for the purpose of driving a water tunnel under the line of Lake Park avenue between 71st and 75th streets. You state in your letter that the records in the Bureau of Maps and Plats indicate that Lake Park avenue was included in the original "South Shore Subdivision."

You further state that at the present time the shore line has been eroded to a point west of the west line of Lake Park avenue. You ask whether or not the city would have the right to consider Lake Park avenue as a street and drive a tunnel underneath it, or whether the street has reverted to the original owner.

In the case of *People v. Kirk*, 162 Ill. 138 (1896), the court, on pages 146 and 147, said:

"The law seems to be well settled in the different States that the title to and dominion over lands covered by the tide waters within the boundaries of the several States belongs to each State wherein they are located. The State holds the fee in trust for the public. The doctrine established in regard to lands covered by tide waters has also been held applicable to lands bounded by fresh water on our large lakes.

* * * Aside from the fact that the waters of our large lakes are fresh and there is no ebb and flow of the tide, they do not differ materially from the open sea, and no reason is perceived why one rule should be applied to lands bounded by the sea and a different rule applied to lands bordering on our great lakes. * * * The Supreme Court of the United States, in *Illinois Central Railroad Company v. Illinois*, 146 U. S. 387, announces the same doctrine laid down by this court. It is there said: 'We hold that the same doctrine as to the dominion and sovereignty over an ownership of lands under the navigable waters of the great lakes applies which obtains at the common law as to the dominion and sovereignty over an ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other and subject to the same trusts and limitations.' It is true that the State holding the title to the lands covered by the waters of Lake Michigan does not hold such title subject to barter and sale, as does the United States its public lands; but the State holds the title in trust, in its sovereign capacity, for the people of the entire State, for the purposes of navigation and fishery."

And again at page 152 the Supreme Court further states:

"In this country each State, subject to limitations to be found in the Federal Constitution, has the absolute control of all the navigable waters within its limits."

The Supreme Court has reaffirmed the above decision in the following cases:—

Revell v. People, 177 Ill. Sup. 468. (1899).

Cobb v. Commissioners of Lincoln Park, 202 Ill. Sup. 427. (1903).

Commissioners of Lincoln Park v. Fahrney, 250 Ill. Sup. 256. (1911).

A general rule of law which has been upheld in most of the jurisdictions of the United States is that title to land bordering on navigable waters is lost to its owners by erosion, that is the washing away of the land from time to time during the course of years by the operation of currents and tides, and that the ownership of such land is vested in the State. The exception to the rule, however, is that the owner does not lose title if the land may be returned by accretion or by the exclusion of waters by artificial means.

Under these circumstances the ownership which was temporarily lost will be regained, but it has been held that the land lost by erosion carries with it all the incidents of ownership, and a person who has lost land by erosion has no perpetual right of reclamation. Thus it will be seen that the title to land lost by erosion, where such land has completely disappeared under conditions which support no reasonable hope or expectancy that it can ever be reclaimed, is permanently lost to the original owner.

It follows then that Lake Park avenue, being completely submerged by the waters of Lake Michigan by imperceptible erosion, is now a part of the bed of Lake Michigan, and that the title is now vested in the State of Illinois, subject only to the rights of the people of the State to use the lake for the purposes of fishery and navigation.

We are, therefore, of the opinion that before proceeding to tunnel under the bed of Lake Michigan along the line of Lake Park avenue, between 71st and 75th streets, you should make an application to the Department of Public Works and Buildings of the State of Illinois for a permit.

The Federal Government exercises its authority over the great lakes only when the rights of the people of the State to use the lake for the purposes of fishery or navigation will be interfered with by the legislature

of the State in granting to an individual the use of the lake in derogation of these rights.

We are of the opinion that the building of a water tunnel under the bed of the lake will not interfere with the rights of the public, and that it will be unnecessary to obtain a Federal permit to dig this water tunnel.

Owners of property bordering on the lake hold title to the shore line of the lake, and only have the riparian rights of ingress to and egress from the waters of the lake over their property. The tunnelling under the bed of the lake will not interfere with these riparian rights. It will, therefore, be unnecessary to obtain the consent or permission from any of the owners of property between 71st and 75th streets now bordering on the lake.

CHARGE FOR MATERIAL OBTAINED FROM LAKE MICHIGAN BED

(No. 9998—*Commissioner of Public Works*—D. L.—May 8, 1939—
4 pp.)

In the absence of express legislative authority, the State Department of Public Works and Buildings has no authority to make a proposed charge of 6 cents per cubic yard for the removal of clay and sand from the bed of Lake Michigan when such material is used in the construction of an approved public improvement as the filtration plant.

Citations:

Statutes: IRS '37, 19: 65, 73, 127: 149.

Cases: McCormick v. Chicago Yacht Club, 331 Ill. 521 (1928).

Miller v. Commissioners of Lincoln Park, 278 Ill. 404 (1917).

OPINION OF FOREGOING SYNOPSIS

We have your communication of April 1, 1939, in which you request our opinion regarding the authority of the Department of Public Works and Buildings of the State of Illinois to make a charge of 6 cents per cubic yard for the removal of clay from the bed of Lake Michigan for use in the filtration plant structure.

It is well settled that the ownership of the bed of Lake Michigan is vested in the State in trust for the public. *McCormick v. Chicago Yacht Club*, 331 Ill. 521 (1928); *Miller v. Commissioners of Lincoln Park*, 278 Ill. 404 (1917). By statute jurisdiction of all structures in any of the public bodies of waters within the State is given to the Department of Public Works and Buildings. (Ill. Rev. Stat. 1937, Ch. 19, Pars. 65, 73, Ch. 127, Par. 149.)

There is, therefore, no doubt as to the right of the Department to control the erection of structures in Lake Michigan, and to control the use to be made of the bed of the Lake; the sole question is whether or not its consent or refusal can be conditioned upon the payment of a permit fee.

The proposition presented here is, so far as we have been able to ascertain, a novel one; it has never been judicially determined nor has it been passed upon by the Attorney General of the State of Illinois.

The Department bases its right to make a charge for the issuance of a permit upon statutory provisions. (Ill. Rev. Stat. 1937, Ch. 19, Pars. 65 and 73.) An examination of these provisions does not reveal any express legislative authority to the Department to make such charge. The most pertinent provision is:—

"Said Department of Public Works and Buildings shall, for the purpose of protecting the rights and interests of the State of Illinois, or the citizens of the State of Illinois, have full and complete jurisdiction of every public body of water in the State of Illinois, * * * but nothing in this Act contained shall be construed or held to be any impairment whatsoever of the rights of the citizens of the State of Illinois to fully and in a proper manner, enjoy the use of any and all of the public waters of the State of Illinois, and the jurisdiction of said Department of Public Works and Buildings shall be deemed to be for the purpose of protecting the rights of the people of the State in the full and free enjoyment of all such bodies of water, and for the purpose of preventing unlawful and improper encroachment upon the same, or impairment of the rights of the people with reference thereto, and every proper use which the people may make of the public rivers and streams and lakes of the State of Illinois shall be aided, assisted, encouraged and protected by the Department of Public Works and Buildings." (Ill. Rev. Stat. 1937, Ch. 19, Par. 73.)

Under this statute the function of the Department is to determine whether the public interest is favorably or adversely affected by the erection of a specific structure in a public body of water, or by a particular use of its bed. That determination must be made by a consideration of the relation of the structure or the use to public welfare and to the public enjoyment of the body of water; it cannot depend upon payment or non-payment of any monetary consideration.

In assuming the right to fix the amount of compensation to the State for a particular use of the bed of a public body of water, the Department of Public Works and Buildings has, we believe, assumed to exercise a legislative power which it does not possess. Even if specific authority was conferred upon the department by statute to fix the amount of compensation deemed fair and reasonable by the department for a particular use of the bed of a public body of water, such legislation would be of doubtful validity since it would probably be construed as an unconstitutional delegation of legislative power to administrative officers.

The construction of a filtration plant is a proper use of the public waters of Lake Michigan; that was settled by the Department of Public Works and Buildings when it granted a permit to the city of Chicago to construct the plant in Lake Michigan.

It is, therefore, our opinion that in the absence of express legislative authority authorizing such a charge, the Department of Public Works and Buildings is without authority to make the proposed charge of 6 cents per cubic yard for the removal of clay and sand from the bed of Lake Michigan when such material is used in the construction of an approved public improvement.

STATUS OF FUNDS FROM MOTOR FUEL TAX FOR IMPROVEMENTS

(No. 10016—Engineer of Special Improvements—W. V. S.—May 22, 1939—5 pp.)

When the City Council decides upon a particular improvement project which has been approved by the State Department of Public Works, the motor fuel tax funds on deposit with the State Treasurer may be considered for all practical purposes as set apart for the project in question and as the equivalent of money on deposit in the construction

account, since the Motor Fuel Tax act requires that the State make monthly allocation of funds due to a municipality for its share of the revenue derived from the motor fuel tax.

Citations: IRS '37, 120: 424, 426½.

CITY REGULATION OF COUNTY HOSPITAL AND ILLINOIS RESEARCH HOSPITAL

(No. 9831—President, Board of Health—A. F. G.—May 20, 1938—
10½ pp.)

The County Hospital, operated by the Cook County Board of Commissioners, and the Illinois Research Hospital, conducted jointly by the State Department of Public Welfare and the Board of Trustees of the University of Illinois, within the City are subject to ordinances of the City enacted under the police power and must, therefore, comply with the ordinances for regulating hospitals and with the regulations of the City Board of Health for the conduct of maternity hospitals, maternity divisions of general hospitals, and nurseries for the newborn. The agencies of the State operating these hospitals have been given no power to establish health, fire, or safety regulations for these hospitals different from the ordinances and regulations of the City.

Citations:

Statutes: IRS '37, 23: 5f, 13, 24: 65.75, 65.78, 185, 34: 24, 25, 127: 3, 49,
53 to 55.

Cases: County of Cook v. Chicago, 311 Ill. 234 (1924).
Department of Public Works v. Ryan, 357 Ill. 150 (1934).

OPINION OF FOREGOING SYNOPSIS

Recently you requested this office to advise you as to your authority to require hospitals conducted by the State of Illinois and the County of Cook to comply with the ordinances of the City for regulating hospitals and with the rules and regulations formulated by the Board of Health of the City of Chicago for the conduct of maternity hospitals, maternity divisions of general hospitals and nurseries for the newborn.

You stated that you had in mind particularly the County Hospital operated by the Board of Cook County Commissioners and the Illinois Research Hospital conducted jointly by the State Department of Public Welfare and the Board of Trustees of the University of Illinois.

Among the powers exercised by municipalities are what are known as the police powers of the State. These powers rest in the State and may be delegated to municipal corporations created by the State to be exercised for the welfare, safety and health of the public. Under the police power cities and villages may enact reasonable ordinances to preserve health, suppress nuisances, prevent fires, regulate the use and storing of dangerous articles, control markets, and similar uses and purposes.

The Legislature of this State has given broad powers to the cities of the State in the matter of the protection of public health, the regulation of hos-

pitals and the suppression of disease. Ill. Rev. Stat. 1937, ch. 24, art. V. pars. 76, 77, 78 and sec. 8 of pt. three, art. XII.

There is a distinction, however, between municipal corporations proper such as exist by charters issued by the State, as incorporated towns, cities and villages voluntarily organized under the general Incorporation act, and corporations such as counties and townships which are frequently referred to as involuntary quasi corporations. Municipal corporations are those called into existence either at the direct request or by consent of the persons composing them. Quasi municipal corporations such as counties and townships are at most but local organizations which are created by general law without the consent of the inhabitants thereof for the purpose of the civil and political administration of government and they are invested with but few characteristics of corporate existence.

Under the Counties act counties are constituted bodies corporate and politic with power to make and enter into contracts and to sue and be sued in relation to such contracts and by sections 24 and 25 of this act numerous other powers necessary to the exercise of corporate powers are there granted, not, however, including police powers.

It is the duty of the county to erect or otherwise provide, when necessary and finances will justify it, and to keep in repair, a suitable courthouse, jail and other necessary county buildings.

There is no delegation of police power to the counties and townships of the State and it would seem clear, therefore, that by the delegation of the police power to cities, villages and incorporated towns the Legislature intended that the exercise of that power over the property and inhabitants within the limits of the city or village should be by that municipality, subject, of course, to the right of the State, of which it is never divested, to exercise the police power. *County of Cook v. City of Chicago*, 311 Ill. 234, 242 (1924).

In the case just cited a bill had been filed by the County to enjoin the City from enforcing its fire ordinances against the County in the construction of a county jail. It was contended since the County was a mere subdivision and agency of the State, the City had no authority to enforce its fire ordinances against buildings constructed by the County. But the Supreme Court overruled that contention and held that the County was obliged to comply with the fire ordinances of the City in which its building was located. The court said:

"Counties are *quasi* public municipal corporations created for the purpose of convenient local government and exist only for public purposes connected with the administration of the State government. (Citing cases.) The duty to erect a county jail rests upon the relation of the county to the State. Its use concerns the public at large, for the whole State is interested in the enforcement of the law in each county, and the county acts, in the building of the jail, as an agency of the State. * * *

"The powers granted to the counties under the general law do not include the police power. That power is granted to cities and villages under the act concerning their incorporation and by that statute it extends to all buildings within its limits. * * *

"It is urged that the county is an arm of the State to which there has been committed the control of the county buildings, and that it is not, therefore, subject to the police power of the city. While the county is an agency of the State it is likewise a creature of the State vested with only the powers conferred upon it by the State. It is not correct, therefore, to say that the county is a part of the State in the exercise of police power.

"* * * We are of the opinion that in enacting paragraph 63 of article 5 of the Cities and Villages act, and in using the language, 'and to cause all such buildings and inclosures as may be in a dangerous state to be put in a safe condition,' the legislature intended to confer upon the city council such power over all of the buildings erected within the city as the words there indicate, including those of the county or other municipalities located therein."

Now if the building in question instead of a jail had been a hospital there is little doubt that the doctrine of law here enunciated would be just as applicable and the building regulations of the City would be enforceable. That being true and if, after the completion of such hospital building the County should equip such building as a county hospital, the ordinances of the City of Chicago and the rules and regulations of the Board of Health in relation to hospitals would be enforceable therein, the County having no police power to regulate or control such an institution.

We are, therefore, of the opinion for the foregoing reasons that the Cook County Hospital is subject to the ordinances of the City and the rules of the Board of Health in relation to hospitals.

The Illinois Research and Educational Hospitals in Chicago, a group of hospitals under one roof, are a State institution. It is operated jointly by the Department of Public Welfare and the trustees of the University of Illinois.

Before the adoption in 1917 of the "Civil Administrative Code of Illinois," the management and control of all the charitable, penal and educational institutions of the State was vested in the Board of Administration.

Paragraph (F) of section 4 and section 13 of chapter 23, "Charities," Ill. Rev. Stat. 1937, pp. 256, 257 and 258 give complete powers to "the Board of Administration" in the matter of the inspection of buildings and the administration, regulation and management of all State charities. Sub-paragraph 2 of paragraph (F) provides that the Board of Administration shall:

"2. Exercise executive and administrative supervision over all State charitable institutions, now existing or hereafter acquired or created."

Section 13 of the same act is in part as follows:

"Sec. 13. Under the supervision and direction of the Board of Administration the fiscal supervisor shall:

"1. Examine into the condition of all buildings, grounds and other property connected with any State charitable institution. * * *

"2. Study and become familiar with the relative advantages and disadvantages of the said institutions as to location, freight rates, efficiency of farm and equipment, for the purpose of aiding in the determination of the local and general requirements both for maintenance and improvement.

"3. In all instances of important transactions refer to the board for counsel and approval.

"5. Receive, examine and present with his written opinion to the board, every plan and specification for new construction or repair exceeding in estimated value one thousand dollars. He shall examine into every plan and specification of new construction or improvement, if such improvement exceeds two hundred dollars in cost; *provided*, that all contracts for new construction, improvement or repair must be approved by the State architect or his consulting engineer and by the board, if they exceed in value one thousand dollars, and by the fiscal supervisor, if they exceed in value two hundred dollars; *Provided, further*,

that such approval is also required when such work is undertaken by the management of any institution without contract; *Provided, further*, that in case of an emergency, such as the breaking down of equipment, so as to bring to a standstill any necessary part of the operative machinery of a State institution, whose administration is provided for in this Act, the fiscal supervisor, with the approval in writing of the board and of the Governor, may go into the open market and secure such repairs as are necessary to restore the institution to operative efficiency at the earliest possible time * * *

The "Civil Administrative Code of Illinois" referred to above created several departments of the State government, among which is the Department of Public Welfare. Sec. 3, ch. 127, Ill. Rev. Stat. 1937.

By paragraph 1 of section 53 of this chapter the Department of Public Welfare shall have power:

"1. To exercise the rights, powers and duties vested by law in the board of administration, the fiscal supervisor, and other officers and employees of the board of administration."

Section 54 of this act provides in part as follows:

"Sec. 54. The board of public welfare commissioners shall, in addition to the power vested by this Act in advisory and non-executive boards, have power, and it shall be its duty:

"1. To investigate into the condition and management of the whole system of charitable, penal and reformatory institutions of the State, including State hospitals, penitentiaries, reformatories, jails and almshouses;

"2. To investigate, when directed by the Governor, into any or all phases of the equipment, management or policy of any State charitable, penal or reformatory institution, and report its findings and recommendations to the Governor;

"3. To inquire into the equipment, management and policies of all institutions and organizations coming under the supervision and inspection of the Department of Public Welfare;

"* * *

The Department of Public Works and Buildings, another department created by the Civil Administrative Code, is by paragraphs 13, 14 and 15 of section 49 given power:

"13. To have general supervision over the erection and construction of public buildings erected for any department, and over the inspection of all materials previous to their incorporation into such buildings or work;

"14. To prepare and suggest comprehensive plans for the development of grounds and buildings under the control of any department;

"15. To make and provide all drawings, plans, specifications and models for the construction and perfection of all systems of sewerage, drainage and plumbing for the State in connection with the buildings and grounds under the control of any department."

The Department of Public Health, also a department created by the Civil Administrative Code, is by paragraphs 1, 2, 4, 5, 14 and 15 given power:

"1. To exercise the rights, powers and duties vested by law in the State Board of Health, its secretary and executive officer, other officers and employees, except the rights, powers and duties vested by law in the State Board of Health under the Act to regulate the practice of medicine and the Act to regulate the practice of embalming;

"2. To have the general supervision of the interest of the health and lives of the people of the State;

"4. To make such sanitary investigations as it may, from time to time, deem necessary for the preservation and improvement of public health;

"5. To make examinations into nuisances and questions affecting the security of life and health in any locality in the State;

"14 To make sanitary, sewage, health and other inspections and examinations for the charitable, penal and reformatory institutions and the normal schools;

"15. To inspect, from time to time, all hospitals, sanitarium, and other institutions conducted by county, city, village or township authorities, and to report as to the sanitary conditions and needs of such hospitals, sanitarium and institutions to the official authority having jurisdiction over them."

By the various statutory provisions quoted above it will be seen that the Board of Administration and the Department of Public Welfare, the Department of Public Works and Buildings and the Department of Public Health have been given broad powers of *investigation, supervision and management* of the various State charitable institutions, but we do not find that the Legislature has conferred upon them any general *police power*.

Under our form of government the police power belongs exclusively to sovereignty and inheres in the State without reservation in the Constitution and is given expression by the Legislature. This also is true of the power of eminent domain. The power of eminent domain, like the police power, is inherent in the State and is an attribute of sovereignty.

The right of eminent domain by any corporation or department of the government, as distinguished from the State or sovereignty, like the police power, can be exercised only when such grant is specifically conferred by legislative enactment and then only in the manner and by the agency so authorized.

In holding that the State Department of Public Works and Buildings had no power to condemn land in an incorporated city to establish and lay out streets, our Supreme Court said:

"* * * The Department of Public Works and Buildings is merely a governmental agency of the State created by legislative act and has no power or authority beyond that conferred upon it by the legislature * * *

"The city of Effingham possesses the power to establish and lay out streets within its borders by virtue of the legislative act particularly giving to it such authority. (Smith's Stat. 1933, chap. 24, art. 5, sec. 7, p. 339; Cahill's Stat. 1933, p. 324.) The Eminent Domain act, standing alone, cannot be held to grant to a State agency the power to establish and lay out streets, or to alter or change the same, within the territory of another municipality already possessing the same power herein claimed by the Department * * *"

Department of Public Works v. Ryan, 357 Ill. 150, 155 (1934).

In the same case it was urged by the Department that a provision in the statute which authorized it "to do and perform whatever may be necessary or desirable to effectuate the provisions of this act" is sufficient to grant to the Department, by implication, the power to condemn. To this argument the court said:

"* * * We cannot agree with this contention. The law is reluctant to grant to any branch of the State the power to interfere with the

internal affairs of any other branch of the State or municipality created by the laws of the State. The laying out, establishment and control of streets and thoroughfares within a city, town or village are functions peculiarly within the powers of such municipal corporations. Such functions should not be molested by any outside authority unless such privilege is expressly granted to it."

In the instant case no express power has been conferred on the Department of Public Welfare to protect public health, to regulate hospitals or to suppress disease, within the territory of another municipality which has expressly been granted power by the Legislature to do these very things. The Department of Public Welfare is merely a governmental agency of the State, created by an act of the Legislature, and has no more power or authority than that conferred on it by the Legislature. The protection of public health, the regulation of hospitals and the suppression of disease within a city, town or village are functions particularly within the power of such municipal corporations. Such functions should not be interfered with by any outside authority unless such privilege is expressly granted to it.

Hence it must be held that these agencies of the State have no power to establish any different health, fire or safety regulations for the institutions under their control than prevail in the rest of the city, but that such bodies must comply with the regulations adopted by the city in that regard so far as their institutions within the city are concerned.

It is our opinion, therefore, that the Illinois Research Hospital or any other State hospital located in the City of Chicago is subject to the ordinances of the city enacted under the police power.

RELEASE OF PRISONERS UPON CORONER'S REQUEST

(No. 9934—Commissioner of Police—C. P. H.—December 16, 1938—
3½ pp.)

The Coroner of Cook County has no authority to direct the Department of Police to release or discharge prisoners arrested in connection with the death of any person supposed to have come to his death by violence, casualty or any undue means. He is not a judicial officer in this State and has no jurisdiction or authority over the discharge of prisoners arrested and detained by the police.

Citations:

Statutes: IRS '37, 24: 95, 31: 1 to 29, 38: 660, 673, 681, 682.

Cases: People v. Frugoli, 334 Ill. 324 (1929).

Peoria Cordage Co. v. Industrial Board, 284 Ill. 90 (1918).

Spiegel's H. T. Co. v. Industrial Board, 288 Ill. 422 (1919).

PAYMENT OF CITY JUDGMENTS BY COUNTY

(No. 10164—J. F. G.—December 22, 1939—6 pp.)

The County Board may provide, by resolution, that the outstanding judgments due the City from the County should be paid in five annual installments and then include in the annual appropriation bill and tax

levy for the year 1940 an amount sufficient to cover the first installment. If the County Board so provides for 1940, the court might compel the County Board by mandamus to continue to make similar appropriations in subsequent years and to make the proper tax levies.

The County Board also has power to issue bonds to fund these judgments.

Citations:

Constitution: Illinois (1870), art. IX, secs. 8, 12.

Statutes: IRS '39, 34: 25, 34, 40, 64.

Cases: City of Chicago v. County of Cook, 370 Ill. 301 (1939).

Board of Supervisors v. People, 226 Ill. 576 (1907).

People v. B&O SW RR. Co., 350 Ill. 217 (1932).

People v. Payne, 296 Ill. 430 (1921).

Stone v. City of Chicago, 207 Ill. 492 (1904).

EXPENSES AT JUDICIAL ELECTION

(No. 10068—City Council—J. F. G.—August 4, 1939—2 pp.)

Since the expense of polling places in the judicial election of June 6, 1939 is not a miscellaneous expense of the Board of Election Commissioners, the City is not liable therefor. It is a direct expense of holding the general County judicial election and should be borne by the County.

Citations:

Cases: Johnson v. County of Winnebago, 256 Ill. 276 (1912).

Jacob v. City of Peoria, 345 Ill. 222 (1931).

People v. Bowman, 253 Ill. 234 (1911).

APPROPRIATIONS FOR ELECTION COMMISSIONERS AND MUNICIPAL COURT.

(No. 10063A—City Council—J. F. G.—Aug. 1, 1939—11½ pp.)

Both the Board of Election Commissioners and the Judges of the Municipal Court are corporate authorities of the City and, as such, are subject to the laws governing officers of the City.

The Election Commissioners have the power to compel the City Council to make adequate provision in its annual appropriation ordinance for payment of their ordinary and necessary expenses. They have no authority, however, to incur any expense in excess of the appropriation.

The officers of the Municipal Court are bound to keep within the appropriations made by the City Council, except as to salaries which

are fixed by statute or by a majority of the Judges pursuant to statute.

Citations:

Constitution: Illinois, art. IV, sec. 34.

Statutes: IRS '37, 24: 104; 38: 449.

Municipal Court act of May 18, 1905.

Cases: Wetherell v. Devine, 116 Ill. 631 (1886).

Empire Voting Machine Co. v. Chicago, 267 Fed. 162 (1920).

People v. Wabash RR. Co., 276 Ill. 92, 96 (1916).

McKean v. County of Carroll, 324 Ill. 243 (1926).

People v. Shader, 326 Ill. 143 (1927).

City of Chicago v. County of Cook, 370 Ill. 301 (1938).

People v. City of Chicago, 310 Ill. 534 (1923).

People v. City of Chicago, 360 Ill. 25 (1935).

RELATION OF BOARD OF EDUCATION TO CITY

(No. 10159—Committee on Consolidation, Reorganization and Taxations—A. F. G.—December 18, 1939—4½ pp.)

Under existing law, the Board of Education is a separate corporation distinct from the City. Therefore, when City officers levy school taxes or do other acts under the school law, they are acting as agents of the Board of Education and not as agents of the City in its corporate capacity.

However, the General Assembly may constitutionally withdraw from the Board of Education any of the powers granted to the Board and transfer such powers directly to the City.

Citations:

Statute: IRS '39, 122: 151.

Case: Mathews v. City of Chicago, 342 Ill. 120 (1930).

OPINION OF FOREGOING SYNOPSIS

On November 29, 1939 you sent to this office the following letter:

"At a meeting of the Committee on Consolidation, Reorganization and Taxation held today, it was requested that you furnish this committee with a written opinion on the legal question of placing in the City Council the power and control over the appropriations and expenditures of the Board of Education.

"This is supplementary to the request to you under date of November 28, 1939 by Ald. Quirk, Chairman of a sub-committee and oral opinion by Mr. Grossman at the meeting today."

The City of Chicago is a municipal corporation organized under the Cities and Villages Act. The Board of Education is a separate and distinct corporation organized under an entirely different statute, namely the School Law.

Section 128 of the School Law, as amended (Ill. Rev. Stat. 1939, Chapter 122, Section 151) reads in part as follows:

"Sec. 128. Each city having a population exceeding 500,000 inhabitants shall constitute one school district which shall maintain a

thorough and efficient system of free schools, which shall be under the charge of a board of education, which shall be a body politic and corporate, by the name of 'Board of Education of the City of', and by that name may sue and be sued in all courts and places where judicial proceedings are had. * * * *No power vested in such board of education, or in any of its officers, agents or employees, shall be exercised by the city council of such city.*"

However, Section 135 of the School Law provides that nothing contained in said Act "shall be construed so as to authorize any such board of education to levy or collect any tax, but the city council of said city shall, upon the demand and under the direction of such board of education, annually levy all school taxes."

Other provisions of the School Law impose upon the city officials duties pertaining to the Board of Education. These duties of the City Council and certain officers of the city are not conferred by the Cities and Villages Act under which the city is organized, but by the School Law under which the Board of Education is organized as a corporation and it is clear that the City Council and the officers of the city in the performance of these duties are acting as agents of the Board of Education and not as agents of the city in its corporate capacity.

In *Mathews v. City of Chicago*, 342 Ill. 120 (1930), our Supreme Court, in passing upon the validity of a bond issue to create a working cash fund for the Board of Education of the City of Chicago, said: * * *

Notwithstanding all that has been said, there is no doubt that the General Assembly has the constitutional right to withdraw from the Board of Education any of the powers granted to that corporation and transfer those powers to the corporate authorities of the City of Chicago or it may, if it sees fit, transfer powers now vested in the city to the Board of Education. However, such policy could hardly be embarked upon without destroying the independence of the city and Board of Education as corporate bodies so as to permit the city and the Board of Education each to incur indebtedness within the constitutional limitation of five per cent of the assessed value of property within the corporate limits of the City of Chicago.

MAINTENANCE OF WESTERN AVENUE BRIDGE

(No. 10139—*Engineer of Special Improvements*—R. J. N.—November 16, 1939—4½ pp.)

The Sanitary District is liable for maintenance of the new Western avenue bridge, under the ordinance passed by the City Council on July 11, 1895, and accepted by the Sanitary District on August 14, 1895.

Citation: Sanitary District of Chicago v. Lee, 79 Ill. App. 159 (1898).

CHAPTER V

REGULATION OF PUBLIC HEALTH, SAFETY AND WELFARE

A. FOODS AND COSMETICS

INSPECTION OF CANDY

(No. 9768—*President, Board of Health—M. H. F.—January 28, 1938*
—8½ pp.)

If Federal and State pure food laws are insufficient to protect the public against deleterious candy, the City Council would be authorized to enact a reasonable ordinance: (1) to make it unlawful for any person to sell or offer for sale within the City any candy which was adulterated or misbranded, or which contained any ingredient deleterious or detrimental to health; (2) to provide for the inspection by the City Board of Health of all candy sold or offered for sale within the City; (3) to require the affixing of a certificate of inspection to each separately wrapped candy bar and to each package or container; and (4) to provide for the inspection and regulation of all candy factories within the City. It is doubtful, however, that the courts would uphold an ordinance provision for the inspection by the City Board of Health of candy factories located outside the corporate boundaries of the City.

Citations:

- Statutes:** USCA, title 21, secs. 7, 8, 10, 39a.
IRS '37, 56½: 7, 8, 24: 65.49, 65.52, 65.65, 65.77, 65.82.
- Cases:** *Gundling v. Chicago*, 176 Ill. 340 (1898); affirmed 177 US 183 (1900).
Illinois Cigarette Service Co. v. Chicago, 89 Fed. (2d) 610 (1937).
Chicago v. Arbuckle Bros., 344 Ill. 597 (1931).
Crackerjack Co. v. Chicago, 330 Ill. 320 (1928).
Chicago v. Great Atlantic and Pacific Tea Co., 282 Ill. App. 337 (1935).
Chicago v. Drozasawacz, 256 Ill. 34 (1912).
Koy v. Chicago, 263 Ill. 122 (1914).
Chicago v. Union Ice Cream Co., 252 Ill. 311 (1911).
Chicago v. Netcher, 183 Ill. 104 (1899).
Kinsley v. Chicago, 124 Ill. 359 (1888).
United States v. Thirteen Crates of Frozen Eggs, 215 Fed. 584 (1914).
United States v. Sprague, 208 Fed. 419 (1913).
United States v. Four Hundred Sixty-Two Boxes of Oranges, 249 Fed. 505 (1917).
People v. Price, 257 Ill. 587 (1913).
Price v. Illinois, 238 US 446 (1915).
Commonwealth v. Moore, 100 NE 1071 Mass. (1913).
Schollenberger v. Pennsylvania, 171 US 1 (1898).
Crossman v. Lurman, 192 US 189 (1904).
Savage v. Jones, 225 US 501 (1912).
City of Rockford v. Hey, 366 Ill. 526 (1937).

OPINION OF FOREGOING SYNOPSIS

Under date of January 14, 1938 you requested an opinion as to whether a valid ordinance can be drawn which will require local and foreign manufacturers of candy offered for sale in Chicago to affix to each bar, package or container of candy a certificate issued by the Chicago Board of Health, certifying that the contents have been manufactured under sanitary conditions and the product is free from harmful ingredients.

Obviously the purpose of such an ordinance would be to protect the public against deleterious candy.

One of the most important powers of the city is that of caring for the health of the community because the preservation of the health of the public is indispensable to any governmental body clothed with police powers. When the city council considers something dangerous to the health of the community, and in the exercise of its discretion passes an ordinance to prevent such a danger, it is the policy of the law to favor such legislation as being humane and essential to the preservation and protection of the community. Municipalities are allowed a greater degree of the liberty of legislation in this direction than in any other. *Gundling v. City of Chicago*, 176 Ill. 340; aff'd 177 U. S. 183; *Illinois Cigarette Service Co. v. City of Chicago* (CCA, 7th Cir.) 89 F. (2d) 610; *City of Chicago v. Arbuckle Bros.*, 344 Ill. 597. Unsanitary conditions in the production, keeping, handling and sale of food may result in unwholesome food and affect the health of the persons who consume it. The probability of the existence of these conditions renders the business of the production and sale of food a proper one for municipal regulation, and the city council is the judge of the expediency of regulation. *City of Chicago v. Arbuckle Bros.*, 344 Ill. 597.

Candy is food. *Crackerjack Co. v. City of Chicago*, 330 Ill. 320; Section 7, U. S. Food and Drugs Act, Title 21, U. S. C. A.; Section 7, Illinois Pure Food Regulations, Chapter 56½, Illinois Revised Statutes, 1937.

The city possesses broad powers in the matter of providing for and regulating the inspection and sale of food. The source of these powers is found in Sections 50, 53, 66 and 78 of Article V of the Cities and Villages Act, Chapter 24, Illinois Revised Statutes. The exercise of these powers has been generally sustained by the courts. *City of Chicago v. The Great Atlantic & Pacific Tea Co.*, 282 Ill. App. 337, appeal denied by Supreme Court, 282 Ill. App. XLVI; *City of Chicago v. Arbuckle Bros.*, 344 Ill. 597, *Crackerjack Co. v. City of Chicago*, 330 Ill. 320; *City of Chicago v. Drozasa-wacz*, 256 Ill. 34, *Koy v. City of Chicago*, 263 Ill. 122; *City of Chicago v. Union Ice Cream Co.*, 252 Ill. 311, *City of Chicago v. Netcher*, 183 Ill. 104, *Kinsley v. City of Chicago*, 124 Ill. 359.

In sustaining the validity of the city's ordinance regulating the business of manufacturing candy and confectionery for the wholesale or retail trade, the Supreme Court held that the term provisions, over which the city had been granted express power to inspect and regulate the sale, included food, and that the term food included candy and other confectionery, and in the case of *Crackerjack Co. v. City of Chicago*, *supra*, said:

"The universal use of confectionery of all sorts by adults and by children renders it preeminently a fit subject for surveillance as an article of commerce under pure food laws and its manufacture and preparation for commerce where it is manufactured."

The Federal Food and Drugs Act and the Illinois Pure Food law furnish protection to the public, the former by making it unlawful for any person to manufacture within any territory or the District of Columbia or transport in interstate commerce any article of food which is adulterated or misbranded, the latter by making it unlawful for any person to manufacture for

sale within the State of Illinois any article of food which is adulterated and misbranded. Under the definitions contained in both of these acts an article of food is deemed to be adulterated if it contains any ingredient deleterious or detrimental to health. Section 8, Title 21, U. S. C. A.; Section 8, Chapter 56½, Illinois Revised Statutes. While the ordinary use of the word "adulteration" implies an actual addition to the original substance, through human agency, the courts have held that the meaning is not so restricted, and if the adulteration of decomposed or putrid substance has been added by nature, the article of food containing it is adulterated in the eyes of the law. *U. S. v. Thirteen Crates of Frozen Eggs*, 215 F. 584; *U. S. v. Sprague*, 208 F. 419; *U. S. v. Four Hundred Sixty-two Boxes of Oranges*, 249 F. 505. It would, therefore, seem to follow that candy would be considered adulterated if it were debased by the addition, either by the hand of man or by nature, of some ingredient deleterious or detrimental to health.

Not only does the Illinois act make it unlawful for any person to manufacture for sale within the State of Illinois any article of food which is adulterated within the meaning of the act, but the possession of adulterated articles of food with intent to sell the same or use the same in violation of the act is also prohibited. In the case of confectionery section 8 of the act provides that an article shall be deemed to be adulterated if it contains terra alba, barytes, talc, chrome yellow, paraffin, mineral fillers or poisonous substances, poisonous color or flavor, any ingredient deleterious or detrimental to health, or any vinous, malt or spirituous liquor or compound, or any narcotic drug. Confiscation of adulterated foods is authorized by section 10. The sale of adulterated food is prohibited by section 39a.

If the Federal and State pure food laws are insufficient to protect the public against deleterious candy, our opinion is that the city council would be authorized to enact a reasonable ordinance making it unlawful for any person to sell or offer for sale within the city any candy which was adulterated or misbranded or which contained any ingredient deleterious or detrimental to health, providing for the inspection by the city's Board of Health of all candy sold or offered for sale within the city, requiring the affixing of a certificate of inspection to each separately wrapped candy bar and to each package or container, and providing, further, for the inspection and regulation of all candy factories located within the city.

In the case of *City of Chicago v. Union Ice Cream Company*, 252 Ill. 311, the Supreme Court held that the passage of the State pure food law did not deprive the city of the power given by the provisions of Article V of the Cities and Villages Act to regulate the sale of impure or adulterated food by ordinance not inconsistent with such statute, and that the regulations enacted by the city might differ from those of the State provided they were not inconsistent therewith.

If it were contended by a nonresident factory that the city's ordinance was an unlawful interference with interstate commerce, this contention, in our opinion, might be met by the authorities of the courts holding that the power of a State or an instrumentality of the State to prohibit within its borders the sale of adulterated food is not repugnant to the commerce clause of the Federal Constitution, but is a valid exercise of the police power of the State. In the case of *The People v. Price*, 257 Ill. 587, a case involving the Illinois Pure Food Law, it was held that if a dealer sells adulterated foods in Illinois in violation of the pure food law, he is not protected by the fact that the food was manufactured in another State and sold in Illinois in the original package. This case was affirmed by the Supreme Court of the United States in the case of *Price v. Illinois*, 238 U. S. 446, the latter court holding that the police power of the State extends to imposing restrictions having reasonable relation to preserving the health of its people and that a prohibition against the sale of food preservatives containing boric acid was not so unreasonable and arbitrary as to amount to the deprivation of prop-

erty without due process of law. In the case of *Commonwealth v. Moore*, 100 N. E. 1071 (Mass.) the court held valid a statute prohibiting the sale of meat slaughtered outside the State unless inspected and approved by a State inspector even though it might incidentally interfere with interstate commerce. To the same effect are: *Schollenberger v. Pennsylvania*, 171 U. S. 1, 13; *Crossman v. Lurman*, 192 U. S. 189, 198; *Savage v. Jones*, 225 U. S. 501.

Because of a recent decision rendered by the Supreme Court of Illinois, we doubt that the courts would uphold an ordinance providing for the inspection by your board of candy factories located outside the corporate boundaries of the city. In the case of *City of Rockford v. Hey*, 366 Ill. 526, the court had before it an ordinance of the City of Rockford making it unlawful for any person (1) to operate an ice cream factory in the City of Rockford, or (2) to sell or offer for sale in Rockford any product manufactured by an ice cream factory without first having registered with the Commissioner of Health of the city the State license issued by the Department of Agriculture and obtaining a certificate of registration upon the payment of an annual inspection fee of \$50.00 to the City Clerk. The ordinance provided that the Commissioner of Health should cause to be made an investigation of the premises of the applicant for license or certificate of registration for the purpose of determining its fitness and suitability for the conduct of the ice cream manufacturing business from a sanitary standpoint, and whether the applicant had complied with the city ordinances regulating health and sanitation so as to properly safeguard and insure the purity of the product to be made or manufactured in such establishment. Hey operated ice cream factories in the cities of Dixon and Sterling and sold and offered for sale at wholesale to merchants in the City of Rockford ice cream manufactured in the factories in the two cities first named. This ice cream was sold to numerous small retail stores in Rockford and by them sold to consumers. Hey had a license from the State to operate an ice cream factory which provided for an inspection by State officers. He refused, however, to register this license with the Commissioner of Health of Rockford or to otherwise comply with the Rockford ordinance. To the contention that the ordinance infringed the due process clauses of the State and Federal Constitutions by requiring an inspection of ice cream factories beyond the corporate limits of Rockford by municipal officers of that city, it was argued for the City of Rockford that the ordinance was a valid exercise of the police power to promote the health of its inhabitants and that the city was impliedly authorized to protect the health of its citizens from the spread of disease by empowering inspectors of its Health Department to go beyond the corporate limits to inspect ice cream factories and the products made by freezing milk and cream. The court held that the City of Rockford had no extra-territorial jurisdiction except as conferred by section 83 of article V of the Cities and Villages Act, which grants express power to municipal corporations to prohibit any offensive or unwholesome business or establishment within or within one mile of the corporate limits, and that the ordinance was void.

If we can be of assistance to you in preparing the form of an ordinance within the limits of the city council's power to enact, please communicate with us.

MARKETING OF "DRY SOUP"

(No. 10055—President of Board of Health—C. P. H.—July 20, 1939—
3 pp.)

A "dry soup" made from chicken fat plus a mixture of spice and a quantity of dry noodles, is a meat product which would require on the

outside of the container a Federal inspection label showing that the contents have been inspected, and also stating the name and address of the packer or distributor of such product.

Citations:

Statutes: USCA title 7, sec. 414, p. 395.

50 US Stat. at large, p. 395.

Ordinance: Code '31: 2964-A.

Case: *Totten v. Pittsburgh Melting Company*, 232 Fed. 694 (1916) affirmed 248 US (1918).

OPINION OF FOREGOING SYNOPSIS

We have your letter of June 15, 1939 wherein you state that there has been recently offered for sale in the City of Chicago a food product known as "Dry Soup." This product is made from chicken fat to which is added a mixture of spices and a quantity of dry noodles. The product is marketed in glass jar containers with a screw top and these containers do not receive any heating or processing such as is usually employed in connection with the canning of foods.

You request our opinion as to whether the product comes within the purview of Section 2964-A of the Revised Chicago Code of 1931, as amended, which provides as follows:

"It shall be unlawful for any person, firm or corporation to pack, prepare, produce or put up for human food, or hold, sell, offer for sale or keep with the purpose of selling within the City of Chicago, any canned carcasses or parts of carcasses of chickens, ducks, geese, turkeys, or other kinds of canned poultry or any products thereof, unless the same shall have been inspected and passed as fit for consumption as human food by a duly authorized inspection of the United States Department of Agriculture.

Each can or other container containing such canned poultry or canned poultry products shall be plainly marked, stamped or labeled on the outside of the container to show that the contents therein have been so inspected and passed by a duly authorized inspection of the United States Department of Agriculture, together with the name and address of the packer or distributor of such canned poultry and such canned poultry products."

Pursuant to an Act of Congress, approved June 29, 1937 (50 United States Statutes at Large, page 395, Title 7, U. S. C. A. Section 414), the Secretary of Agriculture on August 17, 1937 promulgated rules and regulations for the inspection and certification of dressed poultry and edible products thereof for condition and wholesomeness.

Under Section 2964-A set out above, "any canned carcasses or parts of carcasses of chickens * * * or any products thereof," which are sold in cans or other containers must contain a mark, stamp or label on the outside of the container showing that the contents therein have been inspected and passed by the United States Department of Agriculture.

In the case of *Totten v. Pittsburgh Melting Company*, 232 Fed. 694, (1916) affirmed 248 U. S. 1, (1918) it was held that oil extracted from meat did not lose its character as a meat product and therefore fell under the provisions of the Meat Inspection Act and the rules and regulations of the Secretary of Agriculture. The Circuit Court of Appeals in its opinion said, at page 696:

"Being oleo oil, therefore, is it a meat food product? It is, of course, a meat product. * * * What the oleo oil was before the mixing, it con-

tinues to be afterward, and there can be no doubt that the mixture is fit for human consumption and is largely used for food. * * *

As we view the matter, the fact that a chicken fat base is used is sufficient to bring the product described above under the terms of the City's ordinance. It is our opinion, therefore, that the food product described herein would require a Federal inspection label pursuant to the provisions of Section 2964-A of the City's Code.

INSPECTION OF NON-RESIDENT PACKING PLANT

(No. 10013—Acting President, Board of Health—J. F. G.—May 20, 1939—2 pp.)

The City Council may provide for the inspection service of a non-resident packing plant by the Board of Health and for the reimbursement of the cost of such service by the person requesting it. However, the sum so paid for the inspection becomes part of the City's funds which may be expended pursuant only to an appropriation made in the annual appropriation bill.

Citations: *People v. Sergel*, 269 Ill. 618 (1915).
Midland Lumber Co. v. Dallas City, 276 Ill. 172 (1916).
People v. C&A Ry. Co., 289 Ill. 282 (1919).

PASTEURIZATION OF SUB-STANDARD MILK

(No. 9981—Acting President, Board of Health—C. P. H.—April 13, 1939—2 pp.)

Milk containing less than 3¼% butter fat may be pasteurized in the City provided said milk is not labeled "Grade A Pasteurized," does not bear the Board of Health permit number on the bottle caps, and is not sold in the City of Chicago.

Citation: Code '31: 3082.

TRANSFER OF MILK IN QUARTS TO GALLON CONTAINERS

(No. 10014—Acting President, Board of Health—C. P. H.—May 22, 1939—3 pp.)

A buyer may have his milk poured from the original container into his own container if no health hazard is created by so doing.

Present ordinances do not prohibit a retailer from selling a gallon of milk at reduced prices when the purchaser receives four quart bottles of milk and then transfers the milk on the premises to a gallon container of his own. However, if a health hazard is thus created, the City Council has the power to prohibit the transfer from the original container to any other receptacle on the premises of a

milk distributor when milk or milk products are sold for use or consumption and not for resale.

Citations:

Statute: IRS '37, 24: 65, 65.77.

Ordinance: Code '31: 3094.

SERVING MILK PURCHASED IN BULK

(No. 9982—Acting President, Board of Health—C. P. H.—April 13, 1939—2 pp.)

A cooperative eating club may not serve milk purchased in bulk as the ordinances require the serving of milk to the final consumer in the unopened original container as received from the distributor.

ADDING INGREDIENTS TO CREAM

(No. 10085—President, Board of Health—W. V. S.—August 25, 1939—2 pp.)

The addition of flavoring and sugar to cream to make whipping cream does not change the appearance, nor does it substantially change the other physical characteristics of the cream. Hence, this cream is a milk product.

Citation: Code '31: 3082.

DISTRIBUTING BOTTLED FRUIT JUICES FROM MILK DELIVERY VEHICLES

(No. 9958—Acting President, Board of Health—C. P. H.—February 20, 1939—2 pp.)

Prune juice and tomato juice may be distributed in glass bottles from milk delivery vehicles, provided that these juices are of such a character and are so handled that there is no possibility of contamination of milk or milk products.

No special license is necessary to sell or distribute these products from milk delivery vehicles.

Citation: Code '31: 3087, as amended.

CONTAINERS FOR SHUCKED OYSTERS

(No. 10132—*Board of Health—C. P. H.—November 10, 1939—3½ pp.*)

The rules and regulations of the State Department of Health prohibit a retailer from removing shucked oysters from the original container to another receptacle from which they are to be dispensed.

Citations:

Statutes: IRS '39, 111½: 22, 24, 127: 35, 55.

Ordinance: Mun. Code: 9-11.

Other references: State Department of Public Health Rules, sec. 10, item (d) 1, adopted Sept. 1, 1928.

Webster's New International Dictionary (2d Ed.) 1937
"shuck."

**CITY'S REGULATION OF COSMETICS AS AFFECTED BY
FEDERAL ACT**

(No. 9942—*Acting President, Board of Health—M. D. S.—January 5, 1939—2 pp.*)

The Federal Food, Drug and Cosmetic act does not preclude the City Council or Board of Health from adopting such restrictions upon the use and sale within the City of cosmetics as are reasonably necessary to protect the public health.

Citation: Federal Food, Drug and Cosmetic act (1938), sec. 601.

B. LIQUOR**OPERATING TIME OF RETAIL LIQUOR ESTABLISHMENTS**

(No. 10023—*Chairman, Subcommittee on License—M. H. F.—June 5, 1939—6 pp.*)

All holders of City retailer's licenses are required to observe Chicago official time rather than sun time or standard time when conducting licensed businesses which are regulated by ordinances controlling the hours of operation. Hence, the prescribed hours of sale mentioned in the retail liquor dealer's ordinance are those reckoned by official City time, which may be Central Standard Time or Daylight Saving Time, depending upon the season of the year.

Citations:

Statutes: Ill. Liquor Control Law, art. 1, sec. 1, art. VI, sec. 2, art. VII, sec. 10.

Ordinances: Code '31: 711, 3143-O.

Cases: Walker v. Terrell, 189 SW 750 (Tex. 1916).

Salt Lake City v. Robinson, 116 Pac. 442, 35 LRA (NS) 610 (1911).

Mass. State Grange v. Benton, 272 US 525 (1926).

Other references: 19 Op. Corp. Coun. 44 (No. 9610).

26 RCL 727, 730.

OPINION OF FOREGOING SYNOPSIS

You have requested our opinion upon the question whether retail liquor establishments in Chicago are required to be operated on Central Standard Time or Chicago Daylight Saving Time.

Section 3143-0 of the Code, which fixes the hours of sale of alcoholic liquor was last amended January 13, 1937. Section 711 of the Code, which establishes the official time for the city was last amended November 5, 1936, and was effective when Section 3143-0 was last amended. It is therefore unnecessary to consider in this opinion what effect any change of official time would have upon the existing provision for closing of premises where alcoholic liquor is sold.

Section 3143-0 above referred to provides in part as follows:

"Any person licensed under the provisions of this article as a retailer of alcoholic liquor may sell at retail any alcoholic liquor on Sundays until the hour of two o'clock A. M., and between the hours of twelve o'clock noon and midnight. No person licensed hereunder as a retailer of alcoholic liquor shall sell, permit to be sold, or give away any alcoholic liquor between the hours of one o'clock A. M., and seven o'clock A. M. on week days and between the hours of two o'clock A. M. and twelve o'clock noon on Sundays."

Section 711 of the Code, as amended, provides as follows:

"711. Official time—daylight saving.) From and after 2:00 A. M. on November 15, 1936, central standard time shall be the official time within the city of Chicago for the transaction of all city business; except that from 2:00 A. M. on the last Sunday in April in each year official time for the city of Chicago shall be advanced one hour, and at 2:00 A. M. on the last Sunday in September in each year such official time shall, by the retarding of one hour, be returned to central standard time. All legal or official proceedings of the city council and all official business of the city shall be regulated as to time in accordance with the provisions of this section; and when, by ordinance, resolution or action of any municipal officer or body, an act must be performed at or within a prescribed time, it shall be performed according to the official time as herein prescribed. When the words 'daylight saving' or 'daylight saving time' are used in any official document or contract it shall be understood to have reference to the time herein fixed for the period from the last Sunday in April to the last Sunday in September."

The last above quoted section which makes Chicago Daylight Saving Time the official time within the city between the last Sunday in April and the last Sunday in September in each year and which specifically provides "when, by ordinance, resolution or action of any municipal officer or body, an act must be performed at or within a prescribed time, it shall be performed according to the official time as herein prescribed," appears to answer the question propounded by you. It literally requires *all* acts subject to regulation by the city authorities to be performed in accordance with official time and not by sun time or standard time. It requires all holders of city retailer's license to observe Chicago official time when conducting licensed businesses which are regulated by ordinances controlling the hours of operation. Moreover, when all legal or official business of the city is required to be regulated as to time in accordance with the provisions of the section, when the courts are conducted on such time, the transportation companies (except as applied to through trains), the Police Department is operated on such time, city business generally, and all inhabitants of the city regulate their daily living in accordance with such time, to reach any other conclusion would tend to promote a chaotic condition in the municipality which could not long endure. Our opinion therefore is that the prescribed hours of sale mentioned in the liquor ordinance are those

reckoned by official city time, which may be Central Standard Time or Day-light Saving time depending on the season of the year as defined by Section 711 of the Code.

The case of *Walker v. Terrell*, 189 S. W. 750, decided in 1916 by the Courts of Civil Appeals of Texas, an intermediate appellate tribunal, is distinguishable on the ground that it involved the construction of a state statute, applicable to all sections of the state, and not a city ordinance such as the ordinance involved in the instant inquiry, which specifically provides for an official city time. When even standard time is abandoned and saloons are permitted to conduct their business on sun time the Texas decision seems to promote an absurdity. Sun or sundial time varies with every change of longitude, and since the advent of railroads it has been practically obsolete in every civilized country. Furthermore the Texas decision is not in harmony with the best considered adjudications upon the subject. The case of *Salt Lake City v. Robinson*, 116 Pac. 442; 35 L. R. A. (N. S.) 610, was a prosecution in a municipal court, the district court for Salt Lake County, for keeping a saloon open after hours in violation of a municipal ordinance regulating the sale of intoxicating liquors. On appeal to the Supreme Court of Utah that court affirmed a judgment of conviction and held that a municipal court must take notice of the standard by which the time of the municipality is measured, and that it would not be proper to determine the hour for closing saloons under a municipal ordinance by solar time, when the general business of the city was conducted by standard time. The court said:

"We are now dealing with a local ordinance which was passed under conditions which are known to all within the territorial limits where the ordinance was intended to operate. These conditions we are bound to judicially recognize and enforce."

The decision in *Salt Lake City v. Robinson* seems to be in accordance with reason, as holding that the standard of time generally used by the citizens of a locality is that which is ordinarily supposed to be intended unless another standard is definitely referred to. 26 R. C. L. 727, 730.

The Supreme Court of the United States in the case of *Massachusetts State Grange v. Benton*, 272 U. S. 525; 71 Law Ed. 387, has decided that a State statute or municipal ordinance advancing standard time by one hour is not inconsistent with the Federal Standard Time act, as the Federal act is not exclusive of State action on the same subject-matter.

If any judge of the Municipal Court of Chicago, bound to judicially recognize and enforce the City's official time ordinance, and to construe the City's Retail Liquor Dealer's ordinance in harmony with such official time ordinance, should refuse to recognize the City's time standard, when hearing a case involving a prosecution for violation of the liquor ordinance, it is believed that such refusal would be reversible error. By State statute the sale and distribution of alcoholic liquors is required to be controlled to the end that the health, safety and welfare of the people shall be protected and temperance in the consumption of alcoholic liquors shall be fostered and promoted by sound and careful regulation. Section 1, Article I, Illinois Liquor Control law. Should liquor control in Chicago be confronted with a situation in which judges of the City's court would not enforce the City's ordinances the Mayor as Local Liquor Control Commissioner would not be powerless. Under the liquor control law he is vested with authority to revoke the license of any licensee who keeps his tavern open after the closing hour fixed by Section 3143-0, construed in connection with Section 711, of the Municipal Code as amended. A person whose license is revoked for cause is permanently disqualified from ever engaging in the retail liquor business in Illinois. Section 2, Article VI, Illinois Liquor Control law. Furthermore the premises described in such revoked license may not be used in the liquor business

for a period of one year from the date of revocation. Section 10, Article VII, Illinois Liquor Control Law.

The argument that sun time or Central Standard Time must be used because the Retail Liquor Dealer's ordinance does not specifically mention Daylight Saving Time is not convincing. Section 3143-0 and Section 711 are parts of the same Municipal Code and are required to be read together.

The opinion given by this Department to the President of the Board of Health with respect to the recording of birth certificates under State law is not inconsistent with the views herein expressed for the reason that the City of Chicago, as a vital statistics registration district of the State, operates under the rules and regulations of the State Board of Health. Opinions of the Corporation Counsel, Volume XIX, page 44.

CLOSING OF PREMISES SELLING LIQUOR

(No. 10026—Chairman, Subcommittee on Licenses—M. H. F.—June 7, 1939—6 pp.)

Night clubs or public places of amusement dispensing liquor and selling food as part of their business, are not such establishments as are exempt from the prohibition against remaining open after the designated hours in the retail liquor dealer's ordinance.

If the liquor ordinance were amended by striking out the provisions relating to the closing of premises and the locking of doors, it would be permissible for patrons to remain in taverns after the closing hour for the consumption of liquor purchased by them before the closing hour.

Citations:

Statute: State Liquor Control act, art. 1, sec. 2.

Ordinances: Code '11: 1541; '31: 3143-J, 3143-O.

OPINION OF FOREGOING SYNOPSIS

You have asked our opinion regarding the construction of Section 3143-0 of the Code, which section prescribes prohibited hours of sale of alcoholic liquor at retail and, with certain exceptions, provides for the closing of premises during such prohibited hours of sale. In particular, you ask—

- a—Does the exemption set out in the last sentence of Section 3143-0 extend to public places of amusement where they have a food dispensers license and where food is sold as a part of their business?
- b—If Section 3143-0 were amended by striking out all that part of said section following the words "and twelve o'clock noon on Sundays" would it be permissible for patrons to remain in taverns after the closing hour long enough for them to consume liquor purchased and served to them before the closing hour?

Section 3143-0 reads as follows:

"3143-0. SALE ON SUNDAYS—PROHIBITED HOURS OF SALE—PREMISES TO BE CLOSED.) Any person licensed under the provisions of this article as a retailer of alcoholic liquor may sell at

retail any alcoholic liquor on Sundays until the hour of two o'clock A. M., and between the hours of twelve o'clock noon and midnight. No person licensed hereunder as a retailer of alcoholic liquor shall sell, permit to be sold, or give away any alcoholic liquor between the hours of one o'clock A. M. and seven o'clock A. M. on week days and between the hours of two o'clock A. M. and twelve o'clock noon on Sundays. During such prohibited hours of sale every location, place or premise where alcoholic liquor may be sold at retail shall be kept closed and no person other than the licensee or an employee or a member of the immediate family of the licensee shall be permitted to remain therein. All doors directly opening into or out of such location, place or premise for ingress thereto or egress therefrom shall be securely locked during the prohibited hours of sale. The provisions of this section relating to the closing of the premises and the locking of the doors shall not apply to restaurants and hotels licensed as food dispensers nor to clubs, drug stores and delicatessen stores."

The obvious purpose and intention disclosed by the provisions requiring the closing of premises and locking of doors seems to be that of securing compliance with the previous requirement that no alcoholic liquor be sold during the prohibited hours of sale. To permit a retail establishment to remain open at all hours, would of course materially add to the difficulties of enforcing the provision prohibiting sales during the stated hours. Provisions requiring the closing of saloons and bar rooms during certain hours are usual and have been found in liquor control laws and ordinances for many years. The city's dram shops ordinance in force prior to Prohibition provided for the closing of saloon premises. Section 1541, Chicago Code of 1911. Therefore, to permit establishments whose principal business is the sale of liquor to remain open during the prohibited hours of sale would doubtless tend to make a farce of regulations fixing hours of sale.

While it seems to have been the intention of the City Council when enacting Section 3143-0 to require the closing of the premises of proprietors whose principal business is the sale of alcoholic liquor, it seems also to have been the obvious purpose of the Council to leave restaurants, hotels, clubs, drug and delicatessen stores unaffected by the closing requirements. The last sentence of the section specifically provides as follows:

"The provisions of this section relating to the closing of the premises and the locking of the doors shall not apply to restaurants and hotels licensed as food dispensers nor to clubs, drug stores and delicatessen stores."

Your inquiry does not appear to involve hotels, clubs, drug or delicatessen stores, but to relate only to night clubs or establishments whose primary purpose is the sale of alcoholic liquors and whose proprietors take out food dispensers and amusement licenses in order to increase their principal business. When contemplating such establishments the meaning of the word restaurants as used in the above quoted sentence is important. As Section 3143-J of the liquor ordinance requires all words and phrases used therein which are defined in the State Liquor Control Act to be given the meaning accorded to such words and phrases in said act, it is necessary that resort be made to paragraph 12, Section 2 of Article I of the State Act, which paragraph reads as follows:

"The word 'restaurant' means any public place kept, used, maintained, advertised and held out to the public as a place where meals are served, and where meals are actually and regularly served, without sleeping accommodations, such space being provided with adequate and sanitary kitchen and dining room equipment and capacity and having employed therein a sufficient number and kind of employees to prepare, cook and serve suitable food for its guests."

Interpreting the ordinance provision in connection with the State law, there appears to be no doubt that it would be permissible for a bona fide restaurant, as defined in the State Act, to remain open for the conduct of its restaurant business during the prohibited hours of sale of alcoholic liquor, though it could not dispense alcoholic liquor during such hours and under a rational reading of the ordinance would be required to close down its liquor service bar. On the other hand, the mere possession by a retail liquor licensee of a food dispensers license, or a public place of amusement license, or both, would not in our opinion necessarily convert his establishment into a restaurant. While every restaurant is a food dispensing establishment, every food dispensing establishment is not a restaurant. Therefore, and specifically to answer your inquiry (a), our opinion is that the exemption set out in the last sentence of Section 3143-O from the closing requirements does not extend to night clubs or public places of amusement dispensing liquor and having food dispenser's licenses and selling food as part of their business. Of course if a night club should furnish amusement only and dispense food without alcoholic liquor it need not adhere to the prescribed hours of sale of alcoholic liquor.

Your second question is whether in case the Council should amend section 3143-O by striking out the provisions relating to the closing of premises and the locking of doors it would be permissible for patrons to remain in taverns after the closing hour long enough for them to consume liquor purchased and served to them before the closing hour.

While the suggested amendment would be destructive of rational liquor ordinance enforcement and open the door to flagrant abuses and doubtless add to the difficulties confronting the local Liquor Control Commissioner, our opinion is that without these provisions all that would be left of the section would be the prohibition against the actual sale of alcoholic liquor during the prohibited hours of sale. The premises might remain open, patrons permitted and even encouraged to remain therein during all hours of the day and night and not interfered with in their drinking of alcoholic liquors and restrained only by the provision making it unlawful for the licensee to sell during the prohibited hours of sale. As the ordinance would not affect the patrons and their drinking, in order to secure a conviction of the licensee for violating it, it would not be enough to produce evidence that the place was open and customers were drinking therein, but proof of an actual sale would be required. Furthermore, encouragement would be given to those wishing to make a night of it to purchase before the closing hour a sufficient quantity of liquor to last the night through. In short, the amendment would so emasculate the section as not only to tacitly sanction all night activity in taverns and encourage cheating by licensees, but it would make it practically impossible for the police department to secure convictions for violations of the prohibited hours of sale provision. A further thought in this connection is that the underlying purpose of prescribing hours of sale must be not only to restrict sales of liquor but also to regulate the consumption of liquor to the end that intemperance be prevented and nuisance factors involved in dispensing establishments be abated. These, however, are matters for the consideration of the municipal legislative body. Confined to the legal question presented to us our opinion is that if the suggested amendment is made then it would be permissible for patrons to remain in taverns after the closing hour for the consumption of liquor purchased by them before the closing hour.

PROHIBITING SALES OF ALCOHOLIC LIQUOR

(No. 10027—*Alderman, 32nd Ward—M. H. F.—June 8, 1939—2 pp.*)

An ordinance prohibiting sales of liquor for consumption on the premises would probably be upheld, whereas a total prohibition against all persons engaging in the retail liquor business, except those whose principal business was the sale at retail of alcoholic liquors (restaurants, hotels, and clubs excepted), would be of doubtful legality.

Citations: *Atlantic & Pacific Tea Co. v. Mayor of Danville*, 367 Ill. 310 (1937).

City of Chicago v. Netcher, 183 Ill. 104 (1899).

Opinion No. 10022 of June 2, 1939 to Subcommittee on License holds substantially the same as the above opinion.

PROHIBITION OF CURB SERVICE SALE OF LIQUOR

(No. 10156—*City Council—M. H. F.—December 5, 1939—2½ pp.*)

The City's liquor ordinance need not be amended specifically to prohibit the so-called curb service sale of liquor, as both the State statute and the City's ordinance prohibit the retail sale of alcoholic liquor except at licensed premises, and licenses are not granted for premises located on the public ways.

Citations:

Statutes: Ill. Liquor Control act, art. II, art. V, sec. 1 (d), art. VI, sec. 19.

Ordinance: Mun. Code: 147-7.

Other reference: 19 Op. Corp. Coun. 126 (No. 9292).

TOILET FACILITIES FOR LIQUOR ESTABLISHMENTS

(No. 10145—*Board of Health—M. H. F.—November 22, 1939—2 pp.*)

The sanitary requirement section of the retail liquor dealer's ordinance requires the licensees who sell alcoholic liquor for consumption on the licensed premises to equip their establishments with separate toilet facilities for males and females.

Citation: Mun. Code: 147-10.

MEANING OF "MINOR" IN LIQUOR CONTROL ACT

(No. 9854—*Chairman, Committee on License—M. H. F.—June 29, 1939—2 pp.*)

A minor, within the meaning of that term as used in the State Liquor Control Act, is a male under the age of twenty-one years or a female under the age of eighteen years.

Citations:

Statutes: Illinois Liquor Control act, art. VI, sec. 12.

IRS '37, 46: 65, 338, 64: 1.

Cases: *Miller v. Miller*, 257 Ill. App. 287 (1930).

Sayles v. Christie, 187 Ill. 420 (1900).

Other reference: Webster's New International Dictionary (2 ed., unabridged), "minor."

OPINION OF FOREGOING SYNOPSIS

You have requested our interpretation of the word "minor" as used in the Illinois Liquor Control law, Section 12 of Article VI of which states that "no licensee shall sell, give or deliver alcoholic liquor to any minor."

This law does not define the term minor. Hence we must look to other sources of authority in order to ascertain the intent of the legislature.

Webster's New International Dictionary, Second Edition, Unabridged, defines the word as "a person of either sex under full age or majority, that is, one who has not attained the age at which full civil rights are accorded."

At common law an individual became of age at twenty-one years, whether a male or female. *Miller v. Miller*, 257 Ill. App. 287, 291 (1930). This rule has, however, been changed by statute in Illinois. Section 1 of Chapter 64 (Guardian and Ward) of the Illinois Revised Statutes, 1937, provides as follows:

"That males of the age of twenty-one, and females of the age of eighteen years shall be considered of full age for all purposes; and until these ages are attained they shall be considered minors."

In the case of *Sayles v. Christie*, 187 Ill. 420, 437 (1900) the Supreme Court of Illinois said:

"A woman's minority in this State terminates when she is eighteen years of age; at the age of eighteen she reaches her majority."

That the State election laws (paragraphs 65 and 338, Chapter 46 (Elections), Illinois Revised Statutes, 1937) prescribe twenty-one years as the voting age for a female as well as a male does not in our opinion alter the established rule that a female reaches her majority upon attaining the age of eighteen.

Our opinion therefore is that a minor within the meaning of that term as used in the liquor control law is a male under the age of twenty-one years and a female under the age of eighteen years.

LOCAL OPTION ELECTIONS AT NOVEMBER GENERAL ELECTION

(No. 9844—City Clerk—M. H. F.—June 15, 1938—5 pp.)

It is mandatory upon the City Clerk to receive, file and transmit any petitions, in proper form, for local option elections at the general election to be held November 8, 1938, submitted to him in accordance with the provisions of the State Liquor Control Act. The election of certain associate judges of the Municipal Court at that time makes the election a City election within the meaning of the State Liquor Control act.

Citations:

Statutes: Illinois Liquor Control act, art. IX, secs. 1, 2.
IRS '37, 24: 51, 52, 189, 37: 364, 43: 94.

Other reference: 19 Op. Corp. Coun. 99 (No. 9124).

CLOSING OF LIQUOR ESTABLISHMENTS IN "DRY" PRECINCTS

(No. 9993—*Commissioner of Police—M. H. F.—May 2, 1939—1½ pp.*)

A retail liquor dealer who is operating under a license for the current license period and whose precinct voted "dry" at the April 4, 1939 election, may continue his business in the precinct for 30 days after the vote has been taken.

Citation: State Liquor Control act, art. IX, sec. 16.

C. WEAPONS**CARRYING FIREARMS**

(No. 9935—*Commissioner of Police—M. H. F.—December 24, 1938—2 pp.*)

The Commissioner of Police has no authority under the Code to issue a permit to carry firearms, but there is no law or ordinance which prohibits the carrying or transporting of firearms in an open manner and without concealment.

Citations:

Statutes: IRS '37, 38: 155, 155a.

Ordinance: Code '31: 4204.

Other references: 18 Op. Corp. Coun. 432 (No. 6861).

19 Op. Corp. Coun. 88 (No. 9461).

CARRYING CONCEALED FIREARM BY INVESTIGATOR

(No. 10025—*Commissioner of Police—C. P. H.—June 7, 1939—3 pp.*)

A private investigator has no authority to carry a firearm concealed on his person, but if he is designated by the Commissioner of Police as a special patrolman to do special duty at a fixed place in the City, he may carry a firearm about his person while performing his special duties at the designated place.

Citations:

Statutes: IRS '37, 38: 155, 48: 187 to 197.

Ordinances: Code '31: 3744, 3749.

WATCHMAN POSSESSING FIREARMS

(No. 9877—*Commissioner of Police—C. P. H.—August 24, 1938—1½ pp.*)

It is unlawful for a watchman to carry a revolver unless worn or carried openly, or unless the watchman has been duly commissioned as a special patrolman.

Citations: Code '31: 3422, 3425, 3427, 3744, 3749, 4204.

D. GAMBLING AND LOTTERIES

COMMUNITY TRADE STIMULATION DEVICE AS LOTTERY

(No. 9829—*Commissioner of Police—M. H. F.—May 18, 1938—3 pp.*)

A scheme whereby a community newspaper proposes to carry advertisements from local merchants at a certain cost per unit, the unit entitling the merchants to display their goods labelled with their trade signs in the lobby of a local theater for one week and at the end of the week all merchandise so displayed is to be given away from the stage to patrons of the theater after drawing the names of the winners on coupons from a container located in the theater lobby, which coupons are to be clipped from the community newspaper on the day preceding the drawing at the theater and to be filled out with the names and addresses of the persons attending the theater and using them, possesses all the essentials of a gift enterprise or lottery, is an evasion of the State lottery statute, and is prohibited by the State Constitution and by the ordinances of the City. The use of the scheme by a licensed motion picture theater would be cause for the revocation of the theater's City license.

A lottery is a scheme for the distribution of prizes by lot or chance. It consists of three essential elements: (1) a chance (2) for a prize (3) for a price.

Citations: *Iris Amusement Corporation v. Kelly*, 366 Ill. 256 (1937).
State of Washington v. Danz, 140 Wash. 546, 250 Pac. 37 (1926).

OPINION OF FOREGOING SYNOPSIS

We have examined the file transmitted with your letter of May 16, 1938, which file is returned herewith.

From the disclosures made, it appears to be the intention of the Northcenter News to sponsor a "two-day Dollar Day" sales campaign once a month in conjunction with the Northcenter Theater. The paper proposes to carry advertisements from local merchants at a certain cost per unit, the unit entitling participating merchants to the display of their goods, labelled with their trade signs, in the lobby of the theater for one week prior to a planned drawing event. On the night of the first day of the two-day sale all merchandise displayed in the theater lobby is to be given away from the stage to patrons of the theater, the winners to be determined by drawing coupons from a container located in the theater lobby, which coupons are to be clipped from the Northcenter News' front page on the Wednesday preceding the Thursday drawing at the theater, and before depositing in the container are to be filled out with the name and address of the persons attending the theater and using them. It is claimed that the scheme is purely a sales-stimulation plan, not a lottery. You request our opinion as to the legality of the plan.

In the claim that the scheme is not a lottery we are unable to

concur. Our opinion is that it possesses all the essentials of a gift enterprise or lottery, is an evasion of the State lottery statute, and is prohibited by the State Constitution and ordinance of the City. Furthermore, the use of the scheme by a licensed motion picture theater would be cause for the revocation of the theater's city license.

In the case of *Iris Amusement Corporation v. Kelly*, 366 Ill. 256 (1937), wherein the Supreme Court of Illinois by a unanimous decision pronounced illegal and a lottery the gift enterprise known as "Bank Night," an extensive examination was made into the definition of the term "lottery" and the decisions of the courts of this and foreign states pertaining to lottery schemes in theaters. From this decision it is made clear that while the word "lottery" has no technical meaning in the law distinct from its popular significance, it is a scheme for the distribution of prizes by lot or chance, a scheme which consists of three essential parts or elements—i. e., (1) a chance, (2) for a prize, (3) for a price.

In the scheme now under consideration all three of these essential elements exist. The theater patron pays a *price* for his theater admission ticket for which he is given a *chance* to win a *prize* in the form of merchandise. The winners of the prizes are determined by pure chance by drawing coupons from the container. In the view taken by us it is immaterial that three different parties, the Northcenter News, the group of local storekeepers, and the Northcenter Theater, join in promoting and expect to profit by the enterprise. It matters not that the promoting genius of the enterprise is a newspaper publisher and not a theater owner, or that the prizes given cost the theater nothing, but are donated by local merchants who advertise in the newspaper and derive their compensation from having their names displayed with their merchandise in the theater lobby. [*Iris Amusement Corporation v. Kelly*, *supra*; *State of Washington v. Danz*, 140 Wash. 546, 250 P. 37 (1926).] The test whether a lottery exists is applied to the scheme itself viewed in its entirety. The giving of a consideration for the opportunity to win a prize, which prize is awarded by chance, completes a lottery. The scheme, therefore, is against public policy as expressed in the State Constitution, the Criminal Code of Illinois, and the City's ordinance.

LEGALITY OF BOWLING PIN DEVICE

(No. 9997a—Commissioner of Police—C. P. H.—May 5, 1939—3 pp.)

If a bowling pin machine is manually operated by a lever similar to a "Roll-A-Ball" machine it is a bagatelle or pigeonhole instrument and its operation is prohibited by ordinance.

However, if a miniature bowling table is not of the type so prohibited, it is legal but is subject to the licensing provisions regulating the operating of billiard rooms.

Citations:

Ordinances: Coun. J. (1936-37), p. 1638.
Code '31: 1949a.

Cases: Coleman v. City of Chicago, 297 Ill. App. 130 (1938).
Levins v. City of Chicago, 296 Ill. App. 645 (1938).
Silfen v. City of Chicago, 299 Ill. App. 117 (1939).

Other reference: 18 Op. Corp. Coun. 510 (No. 7257).

PUNCH BOARD FOR TICKET SALES

(No. 9927—R. N.—December 10, 1938—2½ pp.)

Dance tickets cannot be sold by means of a punch board, even though the dance is a charitable enterprise, as such selling violates the laws and ordinances prohibiting gambling.

Citation: IRS '37, 38: 341, 344.

E. OTHER HEALTH AND WELFARE REGULATIONS**SIGNATURE OF BIRTH CERTIFICATE**

(No. 9772—President, Board of Health—M. D. S.—February 14, 1938—1½ pp.)

Certificate of births occurring in hospitals attended by unlicensed internes should be signed by the superintendent or manager of the hospital.

Citation: IRS '37, 111½: 47.

ESTABLISHMENT OF A CEMETERY WITHIN THE CITY

(No. 10021—R. N.—June 1, 1939—2 pp.)

A cemetery cannot be established, enlarged or altered within the limits of the City, or within one mile thereof, without being authorized by an ordinance of the City Council, regardless of whether the cemetery is used for burial purposes or for cremation.

Citation: Code '31: 2197a, 2197d.

REFUSE-GATHERING HOLES

(No. 9828—Alderman, 41st Ward—R. N.—May 18, 1938—1½ pp.)

The City has no power to prohibit the practice of property owners of digging unsightly and refuse-gathering holes to obtain black dirt to sell. If the refuse, which is allowed to collect in the holes, becomes unhealthful as well as unsightly, it would become a health matter.

Citation: Code '31: 4235.

REGULATION OF HOURS OF OPERATION OF LIVERY STABLES

(No. 9827—Alderman, 41st Ward—R. N.—May 18, 1938—1½ pp.)

The City has power under the Cities and Villages act to regulate the hours of operation of livery stables.

Citations:

Statutes: IRS '37, 24: 65.81, 65.90.

Ordinances: Code '31: 2167-2177.

DISPLAY AND SALE OF NUDE PHOTOGRAPHS

(No. 10084—Commissioner of Police—W. V. S.—August 24, 1939—6 pp.)

Photographs of female nudes may not be exhibited where they may be seen from the street.

In determining whether a book containing photographs of nude women is indecent so that its sale would be prohibited, the Commissioner of Police should consider the photographs themselves, the manner of their exhibition, sale, and distribution, and also the announced purpose of the book.

Citations:

Ordinance: Code '31: 4223.

Cases: People v. Fellerman, 200 NE 30 (NY 1935).

United States v. Kenney, 209 Fed. 119 (1913).

City of Chicago v. Jackson, 187 Ill. App. 243 (1914).

People v. 245 E. Grand Ave., 289 Ill. App. 612 (1937).

Lynch v. United States, 285 Fed. 162 (1922).

Other reference: Webster's New International Dictionary (2d Ed.) 1937, "lewd," "indecent."

OPINION OF FOREGOING SYNOPSIS

You have requested our opinion as to whether or not the sale of certain volumes containing collections of photographs violates Section 4223 of the Revised Chicago Code of 1931. Your letter quoted from a letter addressed to you by the attorney for Almer Coe & Co. retailers of optical, photographic and meteorological instruments, which stated that "the books in question are intended primarily to afford illustrations for both amateur and professional camera users as to the results obtained by the proper use of film, camera and photographic equipment."

We have examined these books. Each of them consists of a collection of photographs, and with a very few exceptions in some of the books, all of the photographs are of female nudes. In one or two of the books some information is given as to the type of camera and lens used, the time of exposure, the kind of paper used in development, and so forth. None of the photographs is accompanied by suggestive or salacious comment, and none of the poses seems deliberately designed to be suggestive.

The ordinance involved is Section 4223 of the Revised Chicago Code of 1931 which provides:

"Indecent or lewd books, pictures, plays, etc.—exhibition of picture

of nude figure.) It shall be unlawful for any person to exhibit, sell or offer to sell, or circulate or distribute, any indecent or lewd book, picture or other thing whatever of an immoral or scandalous nature, or to exhibit, in any place where the same can be seen from the public highway, or in a public place frequented by children which is not connected with any art or educational exhibition, any picture representing a person in a nude state, or to exhibit or perform any indecent, immoral or lewd play or other representation, under a penalty of not less than twenty dollars nor more than one hundred dollars for each offense."

The provision of the ordinance with respect to the public exhibition of pictures of nudes is unambiguous and there can be no doubt that the exhibition of a photograph of a person in a nude state in any place where it may be seen from the street is a violation of the ordinance.

The criterion fixed by the ordinance to determine whether or not pictures may be privately exhibited, sold or offered for sale, however, is not a fixed and rigid one. Under the ordinance such exhibition or the sale or offering for sale of a picture is prohibited only if the picture is "indecent or lewd." Whether or not a collection of photographs of nudes such as are contained in these volumes is indecent or lewd presents not so much a question of law as a question of morals, the determination of which requires an appraisal of the present moral judgment of the community.

In *United States v. Kennerly*, 209 Fed. 119 (D. C. S. D. N. Y. 1913), a case involving a demurrer to an indictment for the sale of an obscene book, Judge Learned Hand said, page 120:

"Whatever be the rule in England, in this country the jury must determine under instructions whether the book is obscene. The court's only power is to decide whether the book is so clearly innocent that the jury should not pass upon it at all. *U. S. v. Clarke* (D. C.) 38 Fed. 500; *U. S. v. Smith* (D. C.) 45 Fed. 478." * * *

The function of the Department of Law, so far as the present question is concerned should, we think, be that of the courts as defined in the *Kennerly* case, and unless it is clear that the questioned pictures are not offensive, no opinion should be expressed. Further than that this department can not go without usurping a role of censorship which does not properly belong to it. Accordingly we shall consider only whether the content of these volumes is such that, according to prevailing moral standards, they can clearly be said to be neither lewd nor indecent.

The word "lewd" is defined in Webster's New International Dictionary, Second Edition, Unabridged, 1937, as: "lustful; libidinous; lascivious; unchaste," and the following words are listed as synonyms: "licentious; lecherous; dissolute; sensual; debauched; impure; obscene; salacious; pornographic." From this definition it is apparent that the idea of sexual suggestiveness is implicit in the word "lewd." Sexual suggestiveness in photographs is not dependent upon the amount of clothing worn by the model; it is frequently achieved by pose or comment. Photographs of nudes are not, of themselves, within the meaning of the word "lewd," and so the photographs in the volumes in question are clearly not, in our opinion, "lewd pictures" within the meaning of the ordinance.

"Indecent" is defined by the same authority as "morally unfit to be seen or heard; offensive to modesty and delicacy," and as synonyms the following are listed: "immodest; impure; gross; obscene." The word "indecent" implies a moral judgment. Concepts of decency are not fixed; they vary from time to time and from place to place. The change in the style of bathing suits in recent years is a familiar illustration of a

rapid revision of moral judgments. Costumes which a relatively short time ago would have been considered shockingly indecent are now universally accepted without comment.

Judge Learned Hand recognized the flexibility of moral judgments in *United States v. Kennerly*, *supra*, when he said:

* * * "Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of general notions about what is decent. A jury is especially the organ with which to feel the content comprised within such words at any given time, but to do so they must be free to follow the colloquial connotations which they have drawn up instinctively from life and common speech."

We are unable to say that these collections of photographs of nudes are not, according to the moral standards of the day, indecent. That determination involves a delicate appraisal of the prevailing moral standards. The administration of this ordinance is committed to your department and this appraisal should, in the first instance, be made by you. In arriving at a conclusion you should consider the photographs themselves, the manner of their exhibition, sale and distribution and their announced purpose as aids to students of photography.

For such assistance as they may afford in reaching a decision upon this question, we refer you to the following cases in which similar questions were presented:

In *City of Chicago v. Jackson*, 187 Ill. App. 243 (1914), it was decided that the painting "September Morn" was not an indecent or lewd picture.

In *Lynch v. United States*, 285 Fed. 162 (C. C. A. 7, 1922), it was decided that photographs of nude women in a great variety of poses were obscene, lewd and lascivious, although the contention was made that the pictures were works of art and therefore not within the condemnation of the statute involved. In this case, however, a jury had determined that the pictures were "obscene, lewd and lascivious," and the court stated that the evidence showed that they were distributed wholly for the purpose of profitably pandering to the lewd and lascivious.

In *People v. 245 E. Grand Avenue*, 289 Ill. App. 612, 7 N. E. 2nd. 175 (1937), it was decided that a copy of the "Nudist" Magazine which contained pictures of male and female nudes apparently photographed in the presence of each other was lewd and indecent, and the same conclusion was reached by the New York Court of Appeals by a divided court in *People v. Fellerman*, 200 N. E. 30 (1935), affirming without opinion, the decision of the Appellate Division, 276 N. Y. Supp. 198 (1934).

In our opinion, photographs of nudes may not be exhibited where they may be seen from the street, and the volumes in question do not contain lewd pictures; as to whether or not in the moral judgment of the community collections of photographs such as are contained in these volumes are indecent, we express no opinion.

SUPPRESSION OF MOVIE FILMS OF NUDE WOMEN

(No. 9813—C. N.—April 15, 1938—2 pp.)

The provisions of the City Code are sufficiently broad to suppress movie films of nude women sold at local camera stores if the films are

"of an immoral or scandalous nature." The coarse phrasing of literature advertising the films would not constitute evidence sufficient to suppress the films.

Citations:

Statute: IRS '37, 38: 468.

Ordinance: Code '31: 4223.

EXHIBITION OF "BIRTH OF A NATION"

(No. 10107—Commissioner of Police—A. A. P. & C. P. H.—September 30, 1939—4 pp.)

An injunction order entered on March 20, 1917 concerning the exhibition of the motion picture "Birth Of A Nation" does not apply to the "Birth Of A Nation" which was retaken and is different from the one viewed by the court at that time. The showing of the present called "Birth Of A Nation" may be prevented by appropriate action because the present owners or exhibitors failed to comply with the provisions of the ordinance with reference to the assignment, transfer and display of permits.

Citations:

Statute: IRS '37, 38: 471.

Ordinances: Code '31: 1959, 1960.

Case: Epoch Producing Corporation v. City of Chicago et al., Sup. Ct. No. 316146.

CHAPTER VI

LICENSES AND PERMITS

A. LIQUOR LICENSE

APPLICATION FOR LIQUOR LICENSE

(No. 10118—City Collector—M. H. F.—October 19, 1939—1½ pp.)

Since the Illinois Liquor Control law requires a corporate application for a liquor license be signed by the president and secretary of such corporation, the City Collector should not accept an application signed by the corporation's secretary alone.

Citation: Illinois Liquor Control law, art. VII, sec. 1.

LIQUOR LICENSE ISSUANCE AFTER REVOCATION OF AMUSEMENT LICENSE

(No. 9875—Assistant to the Mayor—M. H. F.—August 18, 1938—1½ pp.)

The fact that a former occupant of a premises has had his amusement license revoked for cause does not furnish legal grounds for refusing to grant the liquor license sought by the new applicant.

LIQUOR LICENSE FOR DEMONSTRATION OF BEER KEG

(No. 9773—Commissioner of Police—M. H. F.—February 14, 1938—2½ pp.)

The use of beer to demonstrate a keg by drawing beer from it and replacing the beer in the keg, without the necessary liquor licenses, is contrary to the State law prohibiting with certain exceptions the possession of any alcoholic liquor for beverage purposes. None of the exceptions applies to the demonstration of a beer keg.

Citation: Illinois Liquor Control law, art. I, sec. 1, par. 5; art. II, art. IV.

REFUND OF LIQUOR LICENSE FEE

(No. 9871—Deputy Liquor Control Commissioner—M. H. F.—August 12, 1938—1½ pp.)

A person who operated premises under a retail liquor license for about 15 days and then sold the said premises is not entitled to any

refund of the license fee paid by him, as the City code prohibits the refunding of a license fee.

Citation: Code '31: 2913.

EMPLOYING MINOR IN TAVERN

(No. 9972—C. N.—March 28, 1939—2 pp.)

It is unlawful for the licensee of a tavern to employ a 15½ year-old girl as a waitress while open for the retail sale of alcoholic liquors.

Citations:

Statutes: ISBS '37, 48: 10, 26.

Ordinance: Code '31: 3143.

B. UNDERTAKER'S LICENSE

PROSECUTION OF UNLICENSED UNDERTAKER

(No. 9980—Acting President, Board of Health—C. P. H.—April 12, 1939—2 pp.)

Operators of an undertaking establishment who are operating without a license may be prosecuted for violation of the ordinance requiring such license.

Citations: Code '31: 2183, 3794.

PROPERTY OWNERS' CONSENT BEFORE UNDERTAKER'S LICENSE ISSUED

(No. 10052—President, Board of Health—C. P. H.—July 17, 1939—3 pp.)

A license may be issued for the operation of an undertaking establishment, in a block where no buildings are used exclusively for residential purposes and the premises have been zoned for commercial purposes, without the consent of the property owners in the block.

Citations: Code '31: 3797.

Chicago Zoning ordinance, sec. 8.

Coun. J. (1936-37), p. 3282 (1937-38), p. 4538.

ISSUANCE OF UNDERTAKER'S LICENSE WITHOUT FRONTAGE CONSENTS

(No. 9818—President, Board of Health—R. N.—May 4, 1938—1 p.)

Although frontage consents are now required, the President of the Board of Health should recommend to the City Collector that an under-

taker's license be issued, when at the time of application for a building permit for the undertaking establishment frontage consents were not required, since at the time of the application for the building permit all existing ordinances had been complied with.

BURIAL PERMITS TO UNLICENSED UNDERTAKERS

(No. 9980—*Acting President, Board of Health—C. P. H.—April 12, 1939—2 pp.*)

No burial permits should be issued to an unlicensed undertaker.

Citations: Code '31: 2183, 3794.

C. DRIVER'S AND VEHICLE LICENSES

DRIVER'S LICENSE FOR PERSON WHOSE CONVICTION IS REVERSED

(No. 9897—*Public Vehicle License Commissioner—M. H. F.—October 7, 1938—2½ pp.*)

A person who served time in the penitentiary for murder and then had his sentence set aside by the State Supreme Court has not been convicted of a felony within the meaning of the City's ordinance prohibiting the issuance of a driver's license to "any person who has been an inmate of a penitentiary or reform school because of conviction of a felony."

Citations:

Ordinance: Code '31: 2087.

Case: *People v. Davolio*, 349 Ill. 153 (1932).

LICENSES FOR VEHICLES GARAGED OUT OF TOWN

(No. 10038—*M. H. F.—June 22, 1939—2 pp.*)

The City may impose a vehicle tax for the privilege of using the streets upon owners of vehicles who are resident within the City, irrespective of whether the vehicles are used in a business that is interstate, inter-city, or intra-city, or whether such business is that of a contract carrier or common carrier.

A resident company which uses motor vehicles to deliver products to the City must procure vehicle licenses for the vehicles so operated notwithstanding that they are garaged out of town.

Citations:

Ordinance: Code '31: 2063.

Case: *City of Chicago v. Hastings Express Co.*, 369 Ill. 610 (1938).

Other reference: 19 Op. Corp. Coun. 137 (No. 9260).

TYPE OF PASSENGER SERVICE PROHIBITED

(No. 9745—*Public Vehicle License Commissioner—A. F. G.—January 7, 1938—5 pp.*)

Motor vehicles which start from a private parking lot or garage, accept all who offer themselves for transportation, discharge persons indiscriminately at any point along a fixed route, and pick up any one who offers himself for transportation at stations on private property located along the fixed route, do not come within the definition of public passenger vehicles and may not operate for hire upon the streets of the City. The type of service contemplated by these motor vehicles is a public passenger service which may be carried on only by taxicabs, sightseeing vehicles and motor coaches or buses.

Citations:

Ordinances: Code '31: 2077, 2078.

Other reference: Op. Ill. Atty. Gen. (1933), p. 533.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your letter of December 21, 1937, which is as follows:

"I am in receipt of a letter under date of December 20th from Mr. J. Edward Saff, Attorney, 160 No. LaSalle street, in which he states that he represents the Ni Sun Auto Service; that this company proposes to operate automobiles for the carriage of passengers for hire within the city limits of Chicago; that they will pick up their passengers on private property and discharge them wherever the passengers desire along a specific route; that there is no ordinance in effect in Chicago with respect to this operation; that the Illinois Commerce Commission has no jurisdiction over such operation under existing laws, and that, in a sense, it would be equivalent to livery service and liveries do not require licenses.

"Inasmuch as this contemplated operation will not be a bona fide taxicab service, will you kindly favor me with an immediate opinion as to the legality of this operation, also what procedure we should follow if this service is inaugurated."

Section 2077 of the Revised Chicago Code defines public passenger vehicles as follows:

- "(a) the words 'public passenger vehicle' shall include only taxicabs, sightseeing vehicles and all other motor coaches or buses;
- "(b) the word 'taxicab' means any public passenger vehicle equipped with a taximeter and licensed as a taxicab;
- "(d) The words 'sightseeing vehicle' shall include all motor vehicles having seating accommodations (exclusive of the driver's seat or any portion thereof) for eight or more persons, * * *

Section 2078 is as follows:

"* * * No motor vehicle other than a licensed public passenger vehicle shall be operated along or upon the streets and public ways of the city for the carriage of passengers for hire indiscriminately accepting and discharging such persons as may offer themselves for transportation."

The mode of operation of the Ni Sun Auto Service as described in your letter brings them, in our opinion, within the provisions of the public passenger vehicle ordinance (section 2078).

To subject a motor vehicle to the provisions of section 2078 two essential factors must be present: (1) the vehicle must be operated for hire upon the city's streets and public ways; (2) it must accept and discharge without discrimination all persons who offer themselves for transportation.

The plan of operation of this company is to start its vehicles from a private parking lot or garage, accepting all who offer themselves for transportation, discharging them indiscriminately at any point along a fixed route and picking up at stations on private property located on said route any one who offers himself for transportation.

The ordinance does not contemplate the licensing of all "public passenger vehicles" for subparagraph (a) of section 2077, as amended, includes "only taxicabs, sightseeing vehicles and all other motor coaches or buses." And as shown above, section 2078 provides that only licensed passenger vehicles shall be operated upon the streets of the city "for the carriage of passengers for hire indiscriminately accepting and discharging such persons as may offer themselves for transportation."

The only vehicles therefore that are required to be licensed are those motor vehicles which hold themselves out as public service vehicles ready and willing to accept and discharge any passenger at any place on the streets of Chicago, as distinguished from contract carriers such as funeral cars, livery vehicles, buses for the transportation of school children and vehicles such as operate to carry airplane passengers from the airport to downtown hotels.

This latter group requires no license whatsoever under the ordinance because they are used to transport a particular group of persons by contract or arrangement with the group transported or with some person acting for that group and they are not upon the streets "for the carriage of passengers for hire indiscriminately accepting and discharging such persons as may offer themselves for transportation," as provided in section 2078.

The type of service contemplated by the Ni Sun Company is a public passenger service which can be carried on only by three kinds of vehicles and we do not believe the vehicles of this company come within the provisions of any of them.

They are not "taxicabs" unless the owners consent to install taximeters and be licensed as taxicabs. They are not "sightseeing vehicles" for the reason that they do not meet the capacity requirement of that class. They are not "motor coaches or buses" for this class contemplates only such vehicles as are operated by the Chicago Motor Coach Company and kindred companies.

It is urged by counsel for the company that its service "would be equivalent to livery service and liveries do not require licenses." Liveries as such are not subject to public passenger vehicle license but if liveries cease to operate strictly as liveries and accept all calls and passengers are picked up and delivered without discrimination, they would cease to be liveries and assume the characteristics of "public passenger vehicles" and be subject to license.

This is also the view of the Attorney General of Illinois. In an opinion as to whether section 42a of the Motor Vehicle act, which requires motor vehicles on the streets of cities of 5000 or more population "for the carriage of passengers for hire, indiscriminately accepting

and discharging all such passengers as may offer themselves for transportation" to file a bond or policy of insurance with the Secretary of State to indemnify passengers for injury, applied to livery cars, the Attorney General said:

"As to livery cars answering telephone calls to pick up and deliver passengers, if all calls are accepted and passengers picked up and delivered generally, section 42a applies and owners of the cars should comply with the statute."

Opinions of the Attorney General, 1933, p. 533.

As the words "for the carriage of passengers for hire indiscriminately accepting and discharging such persons as may offer themselves for transportation," which are to be found in section 2078 of the Code, are identical with the language used in section 42a of the Motor Vehicle act, we are of the opinion that if livery cars are operated in the manner shown in the above opinion they would be subject to license as "public passenger vehicles."

From the foregoing we are of the opinion that the vehicles of the Ni Sun Auto Service may not be operated upon the streets of the city for the carriage of passengers for hire.

D. OTHER LICENSES AND PERMITS

LICENSE REQUIREMENTS AS APPLIED TO PETITIONER IN BANKRUPTCY

(No. 10009—Commissioner of Police—M. H. F.—May 17, 1939—3 pp.)

The retail sale of alcoholic liquor or the dispensing of food or the selling of cigarettes are unlawful without the appropriate City licenses. The insolvency of a person subject to license and the filing by such person of a petition in bankruptcy does not enable the debtor to escape compliance with the license requirements of the City.

To avoid any appearance of a violation of the order by the United States District Court restraining interference with the petitioner in bankruptcy, a petition should be presented to the Federal Court for a vacation or clarification of the order.

Citation: US Bankruptcy act, chap. XI.

LICENSES UNDER THE FRAUDULENT SALES ACT

(No. 10080—City Clerk—M. H. F.—August 15, 1939—3 pp.)

A concern intending to hold a "going out of business" sale is required to obtain a City license as required under the Fraudulent Sales act before advertising or holding such sale. A "selling out" sale is tantamount to a "closing out" sale for the purposes of this act.

Citations:

Statutes: IRS '37, 12½: 149 to 156.

Case: People v. Yonker, 351 Ill. 139 (1932).

CERTIFICATION OF AMUSEMENT PLACES BY COMMISSIONER OF PUBLIC WORKS

(No. 9890—Commissioner of Public Works—C. P. H.—September 20, 1938—3½ pp.)

The Commissioner of Public Works is not required to certify that places where it is proposed to conduct theatricals, shows and amusements comply with the ordinances relating to the Department of Public Works, as required by the Building ordinance since there are no ordinances which give the Department of Public Works any jurisdiction or control over such places.

Citations: Coun. J. (1938-39), p. 6444.
Building Code ordinance, ch. 40, sec. 405.04.
1933-34, p. 1329 Ordinance establishing Dept. of Streets and Electricity.

FEE FOR REINSPECTION OF AMUSEMENT DEVICE

(No. 9988—Commissioner of Buildings—M. H. F.—April 18, 1939—3 pp.)

Whenever any portable amusement device is taken down, removed and reassembled in another location outside of an amusement park, a reinspection and payment of the reinspection fee are required before the device may lawfully be operated.

Citation: Chicago Building ordinance, sec. 403.05, 404.05 (b).

LICENSE FOR HOTEL AUCTIONS

(No. 10124—Commissioner of Police—R. N.—October 31, 1939—2 pp.)

Hotels holding auctions of baggage left by guests or obtained as collateral on delinquent accounts must obtain the services of a licensed auctioneer.

Citations: Mun. Code: 106-1, 106-2, 106-7 to 106-9.

REGULATION OF AUTOMOBILE WRECKERS

(No. 9928—Alderman, 41st Ward—R. N.—December 10, 1938—1½ pp.)

The City has no power to license the business of second hand dealers engaged in dismantling automobiles.

Citation: Bullman v. Chicago, 367 Ill. 217 (1938).

EXEMPTION FROM DOG LICENSE FEE

(No. 10011—City Clerk—R. N.—May 19, 1939—1 p.)

The Mayor in his discretion may exempt only foreign consuls or other authorized representatives of foreign governments from paying a dog license fee, but such exemption cannot extend to a clerk in a consulate's office.

Citation: Code '31, 2073, as amended, Coun. J. (1931-32), p. 1842.

DOG LICENSE FEES FOR POLICEMEN'S ANNUITY FUND

(No. 10154—Committee on License—M. H. F.—November 30, 1939—1 p.)

The present ordinances do not require that any portion of dog license fees shall be paid to the Policemen's Annuity and Benefit Fund.

Citation: Mun. Code: 98-27.

**EXEMPTION OF CHARITABLE AND EDUCATIONAL
INSTITUTIONS FROM PAYMENT OF DRIVE-
WAY PERMIT FEE**

(No. 9799—Chairman, Committee on Judiciary and State Legislation—M. H. F.—March 25, 1938—1½ pp.)

The exemption of charitable and educational institutions from payments of driveway permit fee would not render the ordinance governing driveway permits invalid when the driveways are used exclusively for charitable and educational purposes.

Citations: Code '31: 857.

**DRAIN LAYERS' LICENSES TO DIFFERENT PERSONS
PAID FOR BY ONE AGGREGATE CHECK**

(No. 9746—Commissioner of Public Works—M. H. F.—January 8, 1938—2 pp.)

It is proper for the Commissioner of Public Works to accept a single check tendered by the Secretary of the Plumbing Contractors' Association covering the aggregate amount of a number of renewal license fees for drain layers' licenses and accompanied by a like number of acceptable renewal bonds executed by the licensees, the Board of Examiners of Plumbers having certified that the persons so seeking a renewal of their licenses are in good standing and are holders of paid up master plumber licenses, and to issue drain layers' licenses for each of the principals named in the bonds.

Citation: Code '31: 3378.

LICENSE FOR SELLING FLOWERS

(No. 10001—*Commissioner of Police—M. H. F.—May 10, 1939—2 pp.*)

A person may engage in the business of selling flowers from rented space in a parking lot without a license, but he would not be permitted to encroach upon the public ways for the purpose of selling flowers thereon.

Citations: Code '31: 974, 3573 to 3586.

Opinion No. 9864 of July 26, 1938 to the City Council holds substantially the same as the above opinion.

**SEPARATE LICENSE FOR EACH WHOLESALE
FOOD ESTABLISHMENT**

(No. 9747—*City Collector—M. H. F.—January 10, 1938—2 pp.*)

When one person operates more than one wholesale food establishment, a separate license is required for each establishment. The wholesale food establishment ordinance is an establishment license ordinance and a license granted under it is a privilege conferred upon the person licensed to carry on the licensed business at the particular location stated in the license.

Citations: Code '31: 3144 to 3150.

SCHOOLS KEEPING CHILDREN OVER NIGHT

(No. 9819—*President, Board of Health—R. N.—May 4, 1938—1 p.*)

An institution classified as a boarding school which admits children of various ages, some of whom are kept overnight completely separated from their parents, is a home within the meaning of the City code and is required to be licensed.

HOSPITAL LICENSE FOR GROUP OF HOSPITALS

(No. 9849—*President, Board of Health—M. H. F.—June 24, 1938—3½ pp.*)

One hospital license issued to the University of Chicago Clinics will suffice for the Albert Merritt Billings Hospital, the Bob Roberts Memorial Hospital for Children, and the Max Epstein Clinic which are under one management and one roof, but a separate hospital license must be obtained for the Chicago Lying-In Hospital and Dispensary as it is under a different roof, although under the same management as the other institutions.

Citations:

Ordinances: Code '31: 2293, 2294, 2296.

Other reference: Op. Corp. Coun. (1911-12), p. 623.

RENEWAL OF HOSPITAL LICENSE

(No. 9970—*Acting President, Board of Health—C. P. H.—March 23, 1939—2 pp.*)

A person licensed to conduct a hospital is required to file an application each year he desires to obtain a license, as there is no provisions for renewal of hospital licenses.

Citation: Code '31: 2295, 2298.

**LAUNDRY LICENSE WHEN CHARGE MADE
FOR EXPENSES ONLY**

(No. 10028—*M. H. F.—June 9, 1939—2 pp.*)

A social service center may install laundry machinery in its building and do its own laundering, but if the institution does laundering for another institution for which a charge is made, it would be subject to a laundry license under the City's ordinance even though the charge is for expenses only rather than for profit.

Citation: Code '31: 3507.

LICENSE WHEN LUMBER STORED FOR CRATING

(No. 10037—*Superintendent, Bureau of License—R. N.—June 22, 1939—2 pp.*)

When more than five thousand board feet of lumber is stored for the purpose of crating shipments of the products manufactured by the company, the company is subject to the ordinance licensing lumber storehouses, box yards and barrel yards.

Citations: Code '31: 3537, 3539.

**MASSAGE PARLOR LICENSE NOTWITHSTANDING
INJUNCTION**

(No. 10129—*Commissioner of Police—A. A. P.—November 6, 1939—6 pp.*)

An injunction restraining City police from interfering with the plaintiff in the conduct of her massage business at a designated place does not prevent the enforcement of the license ordinances to her at another location, since the question of a license was not adjudicated by the courts in the injunction case.

Citations: Code '22: 2063, 2064.
Code '31: 3294, 3295.
Mun. Code: 152-1, 152-2, 152-7.

OPINION OF FOREGOING SYNOPSIS

Your communication of recent date forwarding the request of Captain George P. O'Connor, Commanding Officer of the First District for an opinion as to the "legality of injunction writ" thereto attached, has been received. The injunction in question was entered by Judge Michael Feinberg of the Circuit Court on October 5, 1930 in the case of *Grace Landon v. William Hale Thompson, Mayor of the City of Chicago and John H. Alcock, Commissioner of Police*.

The complainant in her bill of complaint alleged that she was the lessee of Rooms 1100-02-04, Browning Building at 12 and 14 W. Washington street, and that she operated therein a massage parlor under the name of "B. & M. Institute, Not Inc." That her lease required her to pay \$200.00 per month rental and that she had expended a sum upwards of \$3,000.00 in order to equip said massage parlor. That on the 10th day of September, 1928, her establishment was raided by the Police of the City of Chicago, arresting all persons found on the premises, without any warrant, that thereafter on to wit, the 26th day of September, 1928 the persons arrested were discharged by a judge of the Municipal Court of Chicago; that police officers entered the premises and interfered with the operation of the complainant's business; that again on the 15th day of December, 1928 the complainant's premises were entered into by certain police officers without warrant or any other legal justification; that the complainant committed no crimes and violated no ordinance of the City of Chicago; that she was conducting a lawful business and that the police of the City of Chicago remained on the premises and refused to leave the same and that they threatened to close the plaintiff's place of business and concluded with the usual prayer for injunction.

The defendants filed their answer to the complaint admitting certain allegations and denying others but did not raise the question that plaintiff was operating without a license as required by the city ordinance and concluded with a statement that "a court of equity was without jurisdiction in the premises etc."

The case was referred to Master in Chancery Max M. Korshak, on the bill and answer, who after a full hearing recommended that a permanent injunction be issued restraining the defendants, their agents, attorneys, servants, employees, investigators, deputies, assistants, captains, lieutenants, sergeants, detectives and patrolmen from in any manner interfering with or preventing the complainant Grace Landon from conducting her aforesaid business, and from interfering with or molesting her and any of her patrons or employees by arrests or threats of arrests except upon valid warrants of arrest or other legal process theretofore issued by a court of competent jurisdiction and from interfering or molesting the said complainant, her patrons or employees with physical interference, force, conduct, action or words and from illegally entering or forcing entrance into the said premises or any room thereof and from keeping or stationing on the said premises or near the said premises any of the said police officers or detectives unless the said police officers or detectives had within their possession valid warrants of arrest or other legal process for the arrest or detention of the complainant, any of the patrons or employees. Objections were filed by the defendants to the Master's Report and were overruled, later the objections by order of court were allowed to stand as exceptions and after argument before the chancellor a final decree was entered by Honorable Michael Feinberg, Judge of the Circuit Court on the 5th day of October, 1930. The City prosecuted an appeal in the Appellate Court of the First District.

The Appellate Court in its opinion (delivered by Justice Francis Wilson) stated in part:

"It is insisted on behalf of the defendants that an officer has a right to arrest when he has reasonable grounds for believing that the person arrested is implicated in a crime. This rule is correct, except that it does not apply in the instant case. It is also urged that a police officer has the right to enter a public place or house. This rule is also correct, but there is no evidence that this is a public place within the meaning of that word. It does not appear that there is any ordinance licensing such places nor does it come within the classification of hotels, public buildings, theatres or other such public places."

After reviewing the authorities cited by both parties the court stated further:

"The chancellor having found as a matter of fact that the business of the plaintiff was a legitimate business and not in violation of any law, and this finding having sufficient support in the evidence adduced upon the hearing, it should receive the affirmation of this court unless contrary to the weight of the evidence.

"We see no reason for disturbing the decree and for that reason the decree of the Circuit Court is affirmed."

Hebel, P. J. and Friend, J. Concur.

The Chicago Municipal Code of 1922, section 2064 provided:

"No person, firm or corporation shall establish, maintain or operate any cosmetic or physical therapeutic establishment, as defined in section 2063 without first having obtained a license as hereinabove provided."

Section 2063 defined physical therapeutic establishments to be such places where massage, Turkish, Russian, vapor or other baths are given.

The Revised Chicago Code of 1931, section 3294 defines physical therapeutic establishments to be places where massage, Turkish, Russian, vapor or other baths are given, and section 395 provided:

"No person, firm or corporation shall establish, maintain or operate any cosmetic or physical therapeutic establishment, as defined in the preceding section, without first having obtained a license as herein-after provided."

The Municipal Code of Chicago, Chapter 152, defines massage parlors as follows:

"152-1. For the purpose of this chapter, a 'massage parlor' is hereby defined to mean any building, room, place, or establishment, other than a regularly licensed hospital or dispensary, where non-medical and non-surgical manipulative exercises are practiced upon the human body, for other than cosmetic or beautifying purposes, by anyone not a physician or surgeon or of a similarly registered status, with or without the use of mechanical, therapeutic, or bathing devices.

"152-2. No person shall conduct or operate a massage parlor without first having obtained a license therefor."
It provides further:

"152-7. Every massage parlor shall at all times be held open for inspection by duly authorized representatives of city departments concerned with the licensing and supervision of such establishments. The President of the board of health shall have general sanitary supervision thereof and shall cause inspections of such establishments to be made periodically to determine whether the health and sanitary provisions of this code are being complied with. Moral supervision of massage parlors shall be directed by the commissioner of police."

It is therefore our opinion that the injunctive order entered October 25, 1930 afforded protection to Grace Landon while she was occupying the premises 1100-02-04 Browning Building, at 12 and 14 W. Washington Street. We are of the further opinion that the question of a city license as provided by the sections above quoted not having been adjudicated by the courts, the proper authorities have a right to require the operator of the premises at 32 N. State Street, Room 1316, to obtain a license in accordance with the requirements of the Municipal Code of Chicago. Failure on the part of the operator to comply will subject her to prosecution under the provisions of Chapter 152 of the Municipal Code of Chicago. The restraining order does not prohibit the police or other legally constituted authority from serving valid warrants or other legal processes for any violations of the ordinance of the City of Chicago or the Statutes of the State of Illinois.

FEE FOR VEHICLES TRANSPORTING MILK INTO CITY

(No. 9938—*Superintendent, Bureau of License—M. H. F.—December 29, 1938—3 pp.*)

No milk vehicle license fee is imposed upon one who operates a vehicle for the transportation of milk from a point outside the City to a milk plant within the City, where such operator does not operate a plant nor engage in the milk distributing business.

Citation: Code '31: 3087.

LICENSING AND RESTRICTION OF PEDDLERS

(No. 9742—*Chairman, Subcommittee on Judiciary—M. H. F.—January 4, 1938—6½ pp.*)

The City, under the broad powers conferred upon it by the Cities and Villages act to suppress and prohibit peddlers and to regulate traffic and sales on the streets, may prohibit peddling within certain designated areas by means of a licensing ordinance which operates equally upon all persons licensed under the ordinance.

Citations:

- Statutes: Cities and Villages act, art. V, secs. 9, 20, 41.
Cases: Chicago v. Rhine, 363 Ill. 619 (1936).
Village of Atwood v. Otter, 296 Ill. 70 (1921).
Lauder v. Chicago, 111 Ill. 291 (1884).
Goodrich v. Busse, 247 Ill. 366 (1910).
Chicago v. Brownwell, 146 Ill. 64 (1893).
People v. Cregier, 138 Ill. 401 (1891).
Martens v. People, 85 Ill. App. 66 (1900), affirmed 186 Ill. 314 (1900).
Strauss v. City of Galesburg, 203 Ill. 234 (1903).

OPINION OF FOREGOING SYNOPSIS

With your communication of December 24, 1937 you forward draft forms of proposed ordinances amending Article XXII of Chapter 67 of the Revised Chicago Code of 1931 by inserting a new section after section 3585 entitled "Peddling prohibited in certain districts," which drafts state that no one

having a peddler's license shall peddle any fruits, goods, wares or merchandise or any other article or thing whatsoever at any time within the following described districts. Certain districts are then described. You invite our attention to the custom heretofore followed of passing council orders directing the Commissioner of Public Works to install "No peddlers allowed" signs at points indicated in the orders for the purpose of discouraging peddling in certain districts, and you state that it seems now that the signs themselves have not brought about an improvement in conditions in respect to peddling that the aldermen of the wards intended should be accomplished. You request that we consider the forms of the proposed ordinances and advise your committee with respect thereto.

Doubtless, the mere installation of "No peddling allowed" signs under council orders has not and could not be expected to be entirely efficacious in prohibiting peddling within the districts posted. In an opinion rendered the alderman of the 13th Ward July 8, 1937 (opinion No. 9540, 1937 Opinion Bulletin, Department of Law, No. 6, page 69), this department expressed the view that the only charge which could be brought against peddlers guilty of peddling in areas prohibited by council orders is that of disorderly conduct, but that because peddlers are licensed under the provisions of the code it would be doubtful whether convictions could be obtained in such proceedings. It was suggested that the remedy was to amend the peddler's ordinance so as to designate therein areas in which peddling is prohibited under penalty. The ordinances forwarded with your communication appear to have been drafted in line with this suggestion. Before recommending them to the City Council for passage two of them should be corrected by inserting therein 3585-A as the section number of the added section. It is also believed that improvement could be made in the wording of these ordinances. They state that "no one having a peddler's license shall peddle any fruit, goods, wares or merchandise or any other article or thing whatsoever" etc. If it is the intention to prohibit in the districts designated articles other than fruit and similar produce, it is believed that the present wording might enable some one objecting to the ordinance to employ the doctrine of *ejusdem generis* and contend that only the peddling of fruit and articles of the same general kind and character was prohibited. If you intend to prohibit the peddling of all articles, then we suggest that the following language be employed:

"No peddling whatsoever shall be permitted by virtue of any license within the following described districts."

Assuming that there is a valid basis for the selection of the districts mentioned in the several amendments, our opinion of the districts mentioned in the several amendments, our opinion is that the ordinance would be valid and enforceable against all peddlers licensed after the effective date of the amendments. By section 41 of Article V of the Cities and Villages Act the city has been granted express power to license, tax, regulate, suppress and prohibit peddlers and to revoke such licenses at pleasure. By other sections of the same article express power has been delegated to regulate the use of the streets and to regulate traffic and sales upon the streets, sidewalks, and public places. (Sections 9 and 20.) Under these broad powers to suppress and prohibit peddlers and regulate traffic and sales on the streets the City Council, in our opinion, may by means of a licensing ordinance which operates equally upon all licensees prohibit peddling in certain designated districts. If all licensed peddlers were alike denied the privilege of peddling within the restricted areas there would be no basis upon which any one of them could successfully claim that the ordinance was an unwarranted discrimination between those exercising the same calling or business. It would still be general in character and operate equally upon all persons within the municipality of that class to which the ordinance relates.

In the case of *City of Chicago v. Rhine*, 363 Ill. 619 the Supreme Court of Illinois upheld the validity of section 974 of the Municipal Code which

prohibited the sale on the streets, alleys and public places, within certain defined areas, of everything but newspapers. The court held that the basic purpose of a street is to afford a way for traffic; that the city had the duty to maintain its streets in such condition that the public shall at all times have unobstructed use thereof, and that the ordinance under review which prohibited the sale of all articles except daily newspapers on the streets, alleys or other public places in specified congested districts was within the terms of the legislative grant of power to the city.

Under the grant of power contained in section 44 of Article V of the Cities and Villages Act, which section delegates authority to license, regulate, tax or prohibit and suppress billiard or any other tables or implements kept or used for a similar purpose in any place of public resort, the Supreme Court in the case of *Village of Atwood v. Otter*, 296 Ill. 70, held that the village in its discretion might either license or prohibit the keeping and use of billiard tables in all places of public resort.

So also in the case of *Launder v. City of Chicago*, 111 Ill. 291, the court in construing the source of power contained in section 41 of article V to license, tax, regulate, suppress and prohibit hawkers, peddlers and pawnbrokers, (the section upon which the peddler's ordinance is based), held it to be a matter purely discretionary with the city authorities whether they would license and regulate the business of pawnbrokers or wholly prohibit and suppress business by them. The court in its opinion said on page 296:

"In such case, if the city grants a license, it may impose such conditions and burdens as it may see fit. This latitude of power grows out of the fact that it is discretionary to prohibit the business, or license it on such terms as the city may choose."

In *Goodrich v. Busse*, 247 Ill. 366, the court again considered section 41 and held that an ordinance enacted under it which prohibited any person from crying his wares or otherwise making or causing a noise to be made to advertise such wares, "excepting in amusement grounds, parks, halls and other places duly licensed in accordance with the ordinances of the city" was not, by reason of such exception, void for unjust discrimination, and that it did not deprive peddlers of property without due process of law.

In *City of Chicago v. Brownell*, 146 Ill. 64, an ordinance of the city was held not unlawfully discriminatory which permitted bookmaking within the enclosure of incorporated fairs or race track associations and prohibited bookmaking elsewhere. The court, on page 70 of its opinion, said:

"On the principle that a city council may discriminate between different localities within the city limits in granting license to sell intoxicating liquors, making no distinction between persons, but between places, only, as was held in *City of East St. Louis v. Wehrung*, 46 Ill. 393, this ordinance would be valid in any view which can be taken of it."

Frequently, under the power to license, regulate and prohibit the sale of alcoholic liquors, ordinances have been upheld which authorized the grant of licenses in certain specific parts of a city only. *The People ex rel. v. Creiger*, 138 Ill. 401; *Martens v. The People ex rel.* 85 Ill. App. 66, aff'd 186 Ill. 314; *Strauss v. City of Galesburg*, 203 Ill. 234.

Should your committee decide to recommend to the City Council that the amendments in question be passed, it is suggested that consideration be given to the matter of further amending the peddler's license ordinance so that all applications made for licenses under it and all licenses issued might contain suitable provisions stating that the privilege applied for and the privilege granted by the license might be restricted from time to time by future amendments to the ordinance which would deny a licensee the right to peddle in certain restricted areas.

To aid in the enforcement of the ordinance, as amended, the posting of "No peddling allowed" signs in the restricted areas would be helpful.

The ordinances forwarded with your communication are returned herewith.

PEDDLER'S LICENSE REQUIREMENT

(No. 10100—C. N.—September 16, 1939—2 pp.)

Regardless of the vehicle used, a peddler must have a license before engaging in such business.

Citations: Code '31: 3573, 4194.

QUALIFICATIONS FOR MASTER PLUMBER'S LICENSE

(No. 10123—Board of Examiners of Plumbers—A. F. G.—October 28, 1939—5 pp.)

An applicant for a certificate of license of master plumber, who has had twenty years of plumbing experience and has been licensed during the last ten years as a master plumber under the laws of another state which does not license journeyman plumbers, is entitled to be examined to prove his qualifications as master plumber, even though he has never possessed a journeyman plumber's license.

Citations:

Ordinance: Mun. Code: 162-3.

Cases: Allgeyer v. Louisiana, 165 US 578, 41 L. ed. 832 (1896).
People v. Hinrichsen, 161 Ill. 223 (1896).

OPINION OF FOREGOING SYNOPSIS

On October 18, 1939 you wrote as follows:

"Enclosed please find licenses, application and other evidence showing that Irving J. Gluck has been a practicing Master Plumber in various states in the Union.

"Mr. Gluck was awarded the contract for the plumbing on the Ida B. Wells housing project and is demanding that we examine him as to his qualifications as a master plumber so he can act as the master on this project.

"Would be pleased to have you advise whether, under Section 162-3 of the New Plumbing Code, this Board is within its rights to accept an application from Mr. Gluck and examine him, and if successful issue a certificate as a licensed master plumber.

"Mr. Gluck claims that the state in which he is residing and operating as a master plumber did not require a journeyman plumber's license, hence he was never in possession of one, as our law requires.

"Would appreciate an opinion as soon as possible as to the proper legal procedure in this particular case."

We have examined the application referred to, the certificates of Master Plumber issued to the applicant by the States of New Jersey and Connecticut, and the various letters from Government officials, prominent contractors

and others attesting his outstanding qualifications as a master plumber. His application discloses that he is thirty-eight years of age, served as plumber apprentice five years from 1917 to 1922, was employed as journeyman plumber four years, from 1922 to 1926 and from 1926 to 1929 was employed as estimator and foreman on plumbing work. For the past ten years he has been engaged in the plumbing business as a master plumber in the State of New York and has been licensed as such under the laws of that State. That State does not license journeyman plumbers.

Mr. Irving J. Gluck the applicant has been awarded the contract for plumbing on the Ida B. Wells Low Cost Housing Project, a government sponsored and financed housing project being erected by the Chicago Housing Authority and desires this license for the purpose of this particular job. He has completed contracts for similar projects for the United States Housing Authority and for the United States Quartermaster at the U. S. Military Academy. His experience seems eminently to qualify him for this job.

Section 162-3 referred to above is as follows:

"162-3. An applicant for a certificate of license of master plumber shall present his application therefor to the board of plumbing examiners on the printed form provided for applicants by the board. No application for a certificate of license of a master plumber shall be filed by the said board nor shall any applicant be permitted to take the examination for the certificate of license for a master plumber, unless:

"(a) The application is accompanied by an application fee of \$4.00, payable to the city;

"(b) The applicant is a citizen of the United States;

"(c) The applicant is accompanied with affidavits of the applicant's employer or former employer or other satisfactory evidence showing the applicant has been actually engaged as a licensed journeyman plumber for at least four years, or that such applicant has been graduated from a recognized college or university in a course of plumbing, sanitary engineering, mechanical engineering, civil engineering, or architectural engineering, and has also been employed by a licensed master plumber for at least two years as a licensed journeyman plumber, or that the applicant has been a student in a recognized college or university and has pursued a course in plumbing, sanitary engineering, mechanical engineering, civil engineering or architectural engineering for at least three years and has thereafter been employed as a licensed journeyman plumber by a master plumber for at least three years."

A strict construction of this section would permit only those plumbers to be examined as master plumbers who have been actually engaged as licensed journeyman plumbers for at least four years. Comparatively few of the states have laws licensing journeyman plumbers. A man with twenty years experience as a journeyman plumber in a state which had no law licensing this occupation would be unable to take an examination as master plumber under this ordinance while one with only four years experience as a journeyman plumber in a state licensing this trade would be eligible to examination if he were licensed as such.

To give this section this narrow construction would invade the inalienable right of every citizen to follow any legitimate trade, occupation or business he sees fit. His labor is his property, entitled to the full and equal protection of the law under the due process clause of the Federal Constitution. It is also embraced within the constitutional provision guaranteeing to everyone liberty and the pursuit of happiness. (*Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832.)

No plumber could successfully pass an examination for master plumber without having had several years experience as an apprentice and journey-

man plumber. As practical men in the plumbing trade the members of your Board know this to be a fact.

A wider knowledge not only of the practical side but also of the scientific phases of plumbing is required of one licensed as a master plumber than would be expected of one licensed as a journeyman plumber. He must not only have the practical knowledge of plumbing possessed by a journeyman, but must have the scientific knowledge necessary to plan, devise and install sewage, water or ventilating systems in buildings.

And so, when Mr. Gluck underwent his examination for master plumber and was licensed as such in New York we think, by implication, that he was "licensed" as a journeyman plumber, though no certificate of license as journeyman was issued, none being required by the laws of that State.

A different construction might require an opinion expressing the view that the ordinance unlawfully and unjustly discriminates against one class of plumbers and confers a special privilege on another class in violation of both the Federal and State Constitutions.

In construing statutes a presumption is always indulged in favor of the constitutionality of an act, where the language used will permit such interpretation. In construction, words may be restricted or enlarged, according to the intent with which they are used and their meaning may be gathered from the purpose of the enactment. And when necessary that which is implied as well as that which is expressed may be held to be included within a statute. [*The People v. Hinrichsen*, 161 Ill. 223 (1896).]

We are therefore of the opinion that Mr. Gluck is entitled to be examined to prove his qualifications as master plumber under section 162-3 of the city ordinance.

We are returning enclosures.

REFUSAL OF MASTER PLUMBER'S LICENSE FOR LACK OF BOND

(No. 9868—Board of Examiners of Plumbers—M. D. S.—August 4, —1938—1½ pp.)

The Board of Examiners of Plumbers does not have authority to refuse the issuance or renewal of a master plumber's license to any plumber merely because he has not furnished an indemnity bond to the City.

Citations: Code '31: 740, 4076.

Coun. J. (1935-36), p. 581, Board of Plumbing Examiners ordinance.

CABINET TARGET PRACTICE DEVICE

(No. 9777—City Collector—M. H. F.—February 17, 1938—2 pp.)

A device which consists of a Remington rifle fastened inside of a cabinet, the rifle firing standard low velocity cartridges at a target inside the cabinet, which cartridges are dispensed by the machine for

insertion in the rifle, may be operated in an establishment for which a shooting gallery license has been obtained.

Citation: Code '31: 3734.

USE OF VEHICLES IN SOLID FUEL BUSINESS

(No. 10121—Bureau of License—M. H. F.—October 24, 1939—2½ pp.)

A dealer in solid fuel does not have to do more than offer for sale or sell solid fuel to come within the purview of the ordinance licensing and regulating dealers in solid fuel. Hence, it would be proper to issue a license to a dealer in solid fuel who does not deliver or own or rent a vehicle for use in connection with his business. Any vehicle used for the delivery of solid fuel, even though such vehicle be a passenger motor vehicle, is within the purview of the solid fuel licensing ordinance.

Citation: Mun. Code: 172-1, 172-2, 172-4.

AMOUNT OF PERMIT FEE FOR TANKS

(No. 10097—Alderman, 7th Ward—M. H. F.—September 14, 1939—3 pp.)

The permit fee to install flammable liquid tanks is determined by the class of flammable liquid intended to be stored and is based on the tank capacity.

Citations: Chicago Building ordinance, secs. 403.5, 403.05 (M), 1101.4.

LICENSING OF TRANSIENT VENDERS

(No. 9834—Superintendent, Bureau of License—M. H. F.—May 26, 1938—4½ pp.)

The City has express power to license, tax, regulate, suppress or prohibit itinerant merchants and transient venders of merchandise. However, the present City ordinance licensing transient venders is invalid because it subjects to license only non-residents of the City. The remedy is to amend the ordinance so as to license all transient venders.

Citations:

Statutes: IRS '37, 24: 74, 121½: 158 to 165.

Ordinances: Code '31: 3499 to 3506.

Cases: City of Carrollton v. Bazzette, 159 Ill. 284 (1896).
City of Elgin v. Winchester, 300 Ill. 214 (1921).

OPINION OF FOREGOING SYNOPSIS

On May 19, 1938 you requested that we advise your bureau if any attempt should be made to enforce Section 3500 of the Revised Chicago Code

of 1931, which concerns the licensing of itinerant merchants or transient venders of merchandise.

Section 3500 is the license required section of an ordinance for the licensing of itinerant merchants found in Article XVII of Chapter 67 of the Code, consisting of Sections 3499 and 3506, inclusive. By Section 3499 an itinerant merchant or transient vender of merchandise is defined as one who is a non-resident carrying on a merchandising business in the city but who does not rent a store, loft, warehouse, yard office space, or show room by the year or hold a year's lease on same. Venders delivering merchandise or service through a duly accredited resident agent who complies with the license requirements of the city applying to his line are not by the section classed as itinerants. The license required section makes it unlawful for any person to act as an itinerant merchant or transient vender of merchandise in any hotel, rooming house, club or other public place without first obtaining a license. Section 3501, the application section, contains special requirements, one of which is that the city collector shall be satisfied that the applicant is a proper representative of a reliable and responsible business house and that the proposed sale of merchandise or commodities desired is not contrary to other provisions of the city ordinances. By Sections 3502 and 3503 owners, proprietors or managers of hotels, rooming houses, lodging houses and stores are required to report to the commissioner of police the names of their itinerant merchant guests or lessees and are subjected to a penalty for failure so to do. The fee section prescribes a license fee based on the number of days for which the license is issued at the rate of \$50.00 per day. The mayor is given the right to revoke a license if he shall be satisfied the person operating thereunder is not responsible or does not represent a responsible house or houses.

By an act entitled "An Act to extend the powers of the city council in cities, and the president and board of trustees in villages and incorporated towns," approved June 16, 1887, (Section 74, Chapter 24, Illinois Revised Statutes 1937) municipalities in Illinois have been granted the express power "to license, tax, regulate, suppress or prohibit itinerant merchants and transient venders of merchandise."

By an act entitled "An Act to license and regulate the business of transient merchants, and to provide penalties for the violation of this Act," approved July 3, 1931, (paragraphs 158 to 165 inclusive, Chapter 121½, Illinois Revised Statutes of 1937) the legislature provided for a State license to be procured by any person engaging temporarily in a retail or wholesale sale of goods, wares or merchandise in any place in this State and who for the purpose of conducting such business occupies any lot, business room or structure of any kind. This act provides for the payment of a \$25.00 license fee and for the deposit with the county treasurer of the sum of \$500.00 or the filing of a surety company bond in like amount. The deposit is made subject to claims of creditors and claims for local license fees on behalf of any city, village or township. Paragraph 163 provides that transaction of business by any person for a period of less than six months consecutively shall be *prima facie* evidence that such person is a transient merchant and within the meaning of the act. Paragraph 165 specifically provides that nothing in the act contained shall interfere with the licensing or regulation of said business by any municipality, township, or county in this state not inconsistent with the provisions of the act. This State act subjects to license all transient merchants, whether residents or non-residents.

With the express grant of power conferred upon the City to license, tax, regulate, suppress or prohibit itinerant merchants and transient venders of merchandise, and when this power has been expressly reserved to the City by the State transient merchants act, our opinion is that the City possesses authority to enact a proper transient merchants license ordinance. The ordinance under consideration in our opinion is not a valid ordinance for the

reason that it subjects to license only non-residents of the city. By thus discriminating in favor of residents and against non-residents it is believed the courts would declare it invalid. In the case of *City of Carrollton v. Bazzette*, 159 Ill. 284 (1896), the Supreme Court of Illinois had before it an itinerant merchants license ordinance. On page 290 of its opinion the court said:

"* * * we are of the opinion that the city council had no power to make any discrimination between residents and non-residents of the city, or between those temporarily residing in the city and those permanently residing there, in requiring licenses or in the fees to be paid for such licenses."

And in the more recent case of *City of Elgin v. Winchester*, 300 Ill. 214 (1921), the court again declared invalid an ordinance on this ground, saying on page 216 of its opinion:

"A statute or ordinance which in imposing a license tax discriminates in favor of the residents of a State or city and against non-residents of the same class is unconstitutional."

No reason is seen by us why the City Council, exercising the power granted by Section 74 of the Cities and Villages act, may not amend the ordinance under consideration and by subjecting to license all transient vendors cure the legal defect above noted. Should an amending ordinance be prepared we would suggest that the council give consideration to still other changes in the existing ordinance so as to put it in closer harmony with the State act and by rendering it less drastic, make it less liable to attack.

Until the ordinance is amended to cure the defect pointed out herein, it is not believed that you would be successful in sustaining court proceedings instituted against persons made subject to its terms.

APPLICATION FORM OF WRECKING PERMIT

(No. 10147—*Commissioner of Buildings—A. F. G.—November 27, 1939—1½ pp.*)

The Commissioner of Buildings would be justified in refusing a wrecking permit until the application is made on a form prescribed by the Commissioner.

Citation: Mun. Code: 43-3.

E. REFUND OF LICENSE FEES

REFUND OF LICENSE FEE PAID BEFORE REDUCTION

(No. 10020—*Chairman, Subcommittee on Finance—M. H. F.—May 25, 1939—1½ pp.*)

If a person, subject to the payment of a license fee imposed by ordinance, voluntarily pays the license fee, he cannot recover it, or

any part of it, by court action, even though after the due date of payment, the amount to be paid is reduced by law.

Citations:

Ordinance: Coun. J. (1938-39), p. 6200.

Cases: Rhode v. City of Chicago, 254 Ill. App. 590 (1929).

Yates v. Royal Insurance Co., 200 Ill. (1902).

REFUND OF CERTAIN CIGARETTE LICENSE FEES

(No. 9811—Assistant to the Mayor—M. H. F.—April 11, 1938— $3\frac{1}{2}$ pp.)

The City Council has authority to authorize the refund of cigarette license fees to a claimant who paid for the two license periods of 1937 upon submission of proof by the claimant that he did not engage in the sale, offering for sale, or keeping with the intention of selling, at retail, of any cigarettes or cigarette papers during any part of the two license periods.

Citations: Code '31: 2913, 3780 to 3793.

Coun. J. (1936-37), p. 2862.

REFUND OF FEES WHEN LICENSE INVALID

(No. 10096—Chairman, Commissioner on Finance—M. H. F.—September 14, 1939—2 pp.)

The law is well settled that a person who voluntarily pays a license fee under an ordinance afterwards declared invalid is not entitled to the return of the fee, unless paid both under duress and protest.

Citations:

Cases: City of Chicago v. Ingersoll Steel and Disc Division of Borg-Warner Corp., 371 Ill. 183 (1939).

Yates v. Royal Insurance Co., 200 Ill. 202 (1902).

Rhodes v. City of Chicago, 254 Ill. App. 590 (1929).

Rath v. City of Chicago, 207 Ill. App. 117 (1918).

Other references: 18 Op. Corp. Coun. 464 (No. 6815).

19 Op. Corp. Coun. 180 (No. 9400).

**REFUNDING AMUSEMENT LICENSE FEE
UPON COUNCIL ORDER**

(No. 9889—Assistant to the Mayor—M. H. F.—September 19, 1938— $1\frac{1}{2}$ pp.)

An applicant for a refund of the fee paid by him for a public place of amusement license is not entitled to the refund if he operated his place for any portion of the license period, even though the City Council has ordered the refund, as a Council order cannot modify, suspend, or repeal the provisions of any City ordinance.

Citations: Code '31: 2900.

REFUND OF PERMIT FEE FOR MOTION PICTURE EXHIBITION

(No. 9963—*Chairman, Committee on Finance—C. P. H.—March 9, 1939—3 pp.*)

When a claimant who had been arrested and found guilty of exhibiting motion pictures without a permit, then paid for the permit, and a subsequent examination of the records disclosed that permits had been previously issued for the exhibition but had been lost, a refund of the difference between the fee charged for original permits to exhibit motion pictures and the fee charged for duplicate permits should be made, as in such circumstances, duplicate permits, but not original permits, are required.

Citations: Code '31: 1952, 1958, 1960.

ASSIGNMENT OF TAXICAB LICENSE

(No. 9873—*Public Vehicle License Commissioner—M. H. F.—August 15, 1938—2½ pp.*)

It is proper for the Public Vehicle License Commissioner to refuse to recognize a contract of sale of a taxicab business as an assignment of the seller's taxicab license to the purchaser when the contract does not expressly assign the license and does not recite that the purchaser assumes the liabilities of the seller arising from the maintenance and operation of the taxicab, but instead specifically provides that title to the taxicab shall remain in the seller and that this purchaser shall operate the taxicab in the seller's name and under his license until the purchaser shall secure a license in his own name.

Citations: Coun. J. (1937-38), p. 5027.
Chicago Taxicab ordinance, secs. 3, 6.

METERS FOR LIVERY CABS

(No. 10076—*Chairman, Subcommittee on Taxicabs—J. J. D.—August 10, 1939—3 pp.*)

Livery cabs which do not indiscriminately accept such persons as may offer themselves for transportation at any place upon the public ways but operate as a private livery service do not come within the provisions of the taxicab ordinance and hence need not be equipped with meters nor need they be properly licensed by the City.

Citations:

Case: *People v. Cuneen*, 94 Misc. 509, 159 NYS 967 (1916).

Other reference: Op. Corp. Coun. (No. 9745), this volume, p. 144.

CHAPTER VII BUILDINGS AND ZONING

A. BUILDINGS

REHABILITATION AND DEMOLITION OF UNSAFE OR UNSANITARY BUILDINGS

(No. 10099—Committee on Sub-standard Housing—A. J. R.—September 16, 1939—28 pp.)

The City has the power to invoke the aid of an equity court to give effect to its power to abate a public nuisance in the form of an unsafe and unsanitary dwelling or building. The equity court has power and jurisdiction to grant the necessary remedy in any case where complete evidence shows the premises in question to be a public nuisance because of its unsafe or unsanitary condition. In cases of doubt as to the nuisance character of the building, it would be advisable to resort to the equity court for abatement, except in emergency cases. When it has been ascertained that a building is in such an unsafe or unsanitary condition as to be a public nuisance, abatement should be accomplished by taking the following steps except in emergency cases: (1) notice given to the owner and an opportunity afforded him to abate the nuisance himself; (2) after a reasonable time has elapsed an investigation should be made to produce proof that the building in question is in fact so unsafe and unsanitary as to be a public nuisance; and (3) when the evidence affords a basis for abatement, a court of equity may be petitioned for relief by way of injunction and receivership or for an order for demolition by the proper City department.

After the owner has refused to abate the nuisance his property is in, then abatement may proceed according to the method that is in the best public interest, which, in some instances, may require the receiver to rehabilitate the building rather than to demolish it.

The power to abate a nuisance in equity is in the City, and cannot be delegated to a "semi-public agency."

The equity proceedings should be restored to even in cases of removal of wooden buildings damaged by fire, decay or otherwise to the extent of 50% of the value.

Citations:

Statutes: IRS '37, 24: 65.61, 65.74, 185.

Ordinances: Code '31: 1702, 1703, 2236, 2237.

Cases: People v. Huls, 355 Ill. 412 (1934).

City of Huron v. Bank of Volga, 8 SD 449 (1896).

City of Pana v. Central Washed Coal Co., 260 Ill. 111 (1913).
Laugel v. City of Bushnell, 197 Ill. 20 (1902).
Sings v. City of Joliet, 237 Ill. 300 (1908).
People v. City of Chicago, 260 Ill. 150 (1913).
People v. City of Chicago, 280 Ill. 576 (1917).
City of Bushnell v. Chicago, B&Q RR. Co., 259 Ill. 391 (1913).
Chicago v. Weber, 246 Ill. 304 (1910).
Columbia Athletic Club v. State, 40 NE (Ind.) 914 (1895).
People v. Israelite House of David, 246 Mich. 606, 225 NW 638 (1929).
Knickerbocker v. McKindley Coal Co., 172 Ill. 535 (1898).
Pittsburgh Plate Glass Co. v. Kransz, 291 Ill. 84 (1920).
Village of Louisville v. Webster, 108 Ill. 414 (1884).

OPINION OF FOREGOING SYNOPSIS

On April 14, 1939 Dr. Robert A. Black, then acting president of the Board of Health and acting chairman of Mayor Kelly's Committee on Substandard Housing, addressed to the Corporation Counsel a letter in which he referred to an opinion of the Law Department rendered on February 2, 1939 regarding "Substandard Buildings." In that opinion it was held that where buildings are in an unsanitary condition, or in an unsafe condition, or in any manner endangering the health or safety of any persons the city has the power to compel the rehabilitating of said buildings, and in case of the failure of the owner, after proper notice, to make such repairs as will put the building in a safe or sanitary condition the city has power to order its vacation. In that opinion it was pointed out that this power would not extend to "Substandard Buildings" where such buildings are "substandard" only in that they do not meet standards set up by the Committee on Substandard Housing if they do in fact meet the requirements set up in the Chicago Code, and particularly the new building ordinance.

Dr. Black's letter of April 14, 1939 stated that the subcommittee which had been studying various modifications of a plan for improving blighted areas in Chicago had requested an amplification of the opinion just referred to, particularly as regards cases where it may not be to the public interest to cause a habitable but unsanitary multiple dwelling to be vacated. The letter further stated that it was the judgment of the subcommittee that many such buildings should be rehabilitated without the necessity of dispossessing the tenants or demolishing the structure. There was enclosed with Dr. Black's letter a letter from the subcommittee over the signature of Mr. W. S. Haldeman, its chairman, together with an outline of a proposed procedure for rehabilitation or demolition, as each case might require, of buildings declared to be nuisances. Dr. Black's letter requested an opinion of the Department of Law on the following points:

1. In cases where the usual procedure, as now provided specifically by ordinance, does not seem adequate to abate a nuisance in a multiple dwelling unit, is it possible to abate such nuisance by an equity action? If the answer to this question is in the affirmative, then the following additional information is requested:
2. Where a nuisance has been ordered abated by a city department and confirmed by the Board of Survey without compliance by the owner of the building, will the procedure suggested by the Sub-committee establish sufficient grounds for favorable court action?
3. If the procedure as suggested is not adequate, what additional steps are necessary to establish the right of a public or semi-public agency to abate the nuisance in equity?
4. Where a structure is unoccupied, more than 50 per cent deteriorated, and open to the public, it attracts children, vagrants and vandals.

Can such a structure be considered an attractive nuisance and be abated by equity action?

5. Considerable research work has been done in other states and cities, resulting in new laws to assist public officials in rehabilitating and demolishing deteriorated structures. Is it possible for the Corporation Counsel to make a study of recent laws in effect elsewhere for the purpose of recommending the passage of similar laws applying to conditions in Chicago?

Pursuant to Dr. Black's request this department made an exhaustive study of laws recently enacted and now in effect in several states of the United States dealing with various phases of substandard housing.

Following the receipt of Dr. Black's letter Mr. Charles A. Snyder, executive vice-president of the West Central Association and Mr. W. S. Haldeman, chairman of a subcommittee of Mayor Kelly's Committee on Substandard Housing, who we are given to understand were referred to us by Dr. Black, had frequent conferences with the writer of this opinion and the practical aspects of the operation of any valid and acceptable plan for dealing with the problem which Dr. Black's letter set before us were thoroughly discussed and it was in the light of what these discussions developed that our study of the legislation on the subject was carried on and our opinion on the points submitted in Dr. Black's letter was reached. We shall deal with the points in question in their order.

I.

The first point involves the question of whether "In cases where the usual procedure, as now provided specifically by ordinance, does not seem adequate to abate a nuisance in a multiple dwelling unit, is it possible to abate such nuisance by an equity action?" In answering this question it is necessary that we consider, first, the power of the city to seek the remedy and, secondly, the power of a court of equity to grant it.

Section 75 of Article V of the Cities and Villages Act (Ill. Rev. Stat. 1937, Ch. 24, Par. 65.74, Page 351) provides that the City Council in cities shall have the power "to declare what shall be a nuisance, and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist."

Section 8 of Part III of Article XII of the Cities and Villages Act (Ill. Rev. Stat. 1937, Ch. 24, Par. 185, Page 378) relating to the city of Chicago provides that:

"The City Council shall, by ordinance, be empowered to declare and define nuisances and abate the same, and shall have the power to regulate the location and conduct of hospitals and infirmaries."

In the exercise of the powers thus conferred by the statutes of the State the City Council of the city of Chicago has enacted several ordinances defining certain buildings to be nuisances and providing for abatement.

Sections 1702 and 1703 of the Revised Chicago Code, 1931, are as follows:

1702. Nuisance.) (a) Every building or structure constructed or maintained in violation of any of the provisions of part IV of this ordinance, or which is in an unsanitary condition, or in an unsafe or dangerous condition or which in any manner endangers the health or safety of any person or persons, is hereby declared to be a public nuisance.

(b) Every building or part thereof which is in an unsanitary condition by reason of the basement or cellar being damp or wet, or by reason of the floor of such basement or cellar being covered with stagnant water, or by reason of the presence of sewer gas, or by reason of

any portion of a building being infected with disease or being unfit for human habitation, or which, by reason of any other unsanitary condition, is a source of sickness, or which endangers the public health is hereby declared to be a public nuisance.

1703. Penalty.) Any person, firm or corporation that violates, neglects or refuses to comply with, or who resists or opposes the enforcement of any of the provisions of part IV of this ordinance, where no other penalty is provided, shall be fined not less than twenty-five dollars nor more than two hundred dollars for each offense, and every such person, firm or corporation shall be deemed guilty of a separate offense for every day on which such violation, neglect or refusal shall continue; and any builder or contractor who shall construct any building in violation of any of the provisions of this ordinance, and any architect designing, drawing plans for, or having charge of, such building, or who shall permit it to be constructed, shall be liable to the penalties provided and imposed by this section.

Sections 2236 and 2237 of the Revised Chicago Code, 1931, are as follows:

"2236. Unsanitary building—nuisance.) Any building or part thereof which, by reason of its unsanitary condition or of its being infected with disease, is unfit for human habitation, or which from any other cause is a source of sickness among the inhabitants of this city, or which otherwise endangers the public health, is hereby declared to constitute a public nuisance.

"2237. Examination—notice to abate—demolition.) It is hereby made the duty of the board of health to cause an examination to be made of any building alleged to be a public nuisance for any of the foregoing reasons, such examination to be made by a board of survey, composed of one medical inspector, one sanitary inspector—both of whom shall be appointed by the board of health from its regular force of inspectors—and one building inspector from the regular force of building inspectors, who shall be appointed by the commissioner of buildings at the request of the board of health. If the said board shall find and report that a public nuisance exists, as defined in the foregoing section, the board of health shall serve notice upon the owner of such building, or his agent or the person in possession, charge or control of such building, directing him to abate the nuisance, and to place the building in a condition which shall not endanger the public health, within such reasonable time as the board of survey shall recommend. Upon the failure of the person so notified to obey said notice, the board of health shall, after the expiration of the time specified therein, abate the nuisance by ordering the vacation of such building, or part or parts thereof, when such vacation is required by the public health of this city; and if within thirty days after such vacation has been ordered the building or buildings are not put in a sanitary condition, then the board of health shall have the power to order the demolition of such building or buildings; and the fire commissioner is hereby authorized and instructed to furnish the necessary service for such demolition on the request of the board of health."

It thus appears that the city through its City Council not only possesses but has exercised the power to define and declare nuisances and to make provision for their abatement. There remains to consider under this point whether an equity proceeding may be resorted to for the purpose of effecting abatement.

In the case of *People v. Huls* (1934) 355 Ill. 412, the Supreme Court of this State held that courts of equity have jurisdiction to restrain the maintenance of public nuisances and that their power to do so is of an ancient origin and has been traced back as far as the reign of Queen Elizabeth. In that case the Supreme Court held that the ground of the jurisdiction of courts of equity in cases of public nuisance is their ability to give a more

complete and perfect remedy than is attainable at law in order to prevent irreparable mischief and also to suppress oppressive and vexatious litigation.

The right of cities to apply to a court of equity for aid in giving effect to their granted power to prohibit and suppress nuisances was upheld in *City of Huron v. Bank of Volga* (1896) 8 S. D. 449, and *City of Pana v. Central Washed Coal Co.* (1913) 260 Ill. 111.

In *Laugel v. City of Bushnell*, (1902) 197 Ill. 20, p. 26, the Supreme Court of Illinois said:

"* * * Nuisances may thus be classified: *First*, those which in their nature are nuisances per se or are so denounced by the common law or by statute, *second*, those which in their nature are not nuisances but may become so by reason of their locality, surroundings or the manner in which they may be conducted, managed, etc.; *third*, those which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds."

What the Supreme Court said in the *Laugel* case was approved in *Sings, et al. v. The City of Joliet* (1908) 237 Ill. 300, at 309 and in *The People, ex rel. v. The City of Chicago* (1913) 260 Ill. 150, at 152.

In the latter case the Supreme Court held that:

"* * * The power granted to cities in relation to nuisances authorizes the city council to declare those things falling within the first and third classes to be nuisances, but as to those things falling within the second class the only power the city has is to declare such of them to be nuisances as are so in fact. * * *"

A building which is unsafe or unsanitary is clearly within the third class of nuisances, even if it could be said that it is not within the first.

In view of the distinctions drawn in these cases, it would however, in any equity proceedings instituted to effect the objectives of the Committee on Substandard Housing as indicated in Dr. Black's letter, be advisable to obviate any question of the validity of the Council's definition or declaration of a nuisance by having the court in its decree make the necessary findings, based upon competent and sufficient evidence, declaring the building or buildings or a portion or portions thereof, as the case may be, in multiple dwelling buildings to be a public nuisance or nuisances.

On the first point presented by Dr. Black's letter it is therefore our opinion that the city has power to invoke the aid of a court of equity to give effect to its power to abate a public nuisance in the form of an unsafe or unsanitary building or unsafe or unsanitary portions of a multiple dwelling building, and that a court of equity has power and jurisdiction to grant the necessary remedy in any case where competent evidence shows the premises, or the portion thereof, with reference to which abatement is sought, to be a public nuisance because of the existence of an unsanitary or unsafe condition.

Even in cases to which the provisions of Section 2237 of the Revised Chicago Code, 1931, might be held to be applicable it would be advisable to resort to equity for abatement in cases involving even the slightest measure of doubt on the question of the nuisance character of the property. The power of a city to define and declare nuisances does not extend to declaring anything to be a nuisance which is not a nuisance in fact. *People v. City of Chicago*, (1917) 280 Ill. 576; *City of Bushnell v. Chicago, B. & Q. R. Co.* (1913) 259 Ill. 391; *City of Chicago v. Weber* (1910) 246 Ill. 304. And if a city declares property to be a nuisance and destroys it when, in fact, it is not a nuisance, the city is liable for the damages sustained by the owner. *Sings v. City of Joliet* (1908) 237 Ill. 300.

II.

The second point placed before us by Dr. Black's letter involves the inquiry, "Where a nuisance has been ordered abated by a city department and confirmed by the Board of Survey without compliance by the owner of the building will the procedure suggested by the subcommittee establish sufficient grounds for favorable court action?" The procedure suggested by the subcommittee and referred to in Dr. Black's letter is the following:

1. Complaint is received concerning condition of a structure used in whole or in part as a dwelling or which is detrimental to health, safety or morals.
2. Board of Health, Department of Buildings or Fire Department will inspect and submit report of condition.
3. If condition of the building violates the building, sanitary, health or fire ordinances a notice to abate will be issued by the Department charged with the enforcement of the ordinance so violated.
4. The notice will be sent to last known address of record owner, mortgagee and last taxpayer. A copy will also be sent to the tenants of occupied buildings and to the agents, if any.
5. (a) If no responsible party is located the Board of Survey will be directed to proceed at once. (b) If a responsible party is located and no favorable action is taken towards abatement within time prescribed, then a final notice will be mailed to each responsible party so located.
6. In the absence of favorable action by the owner of the property the Board of Survey will examine the building and submit a report containing:
 - (a) The nature of the nuisance.
 - (b) General method of abatement.
 - (c) Approximate minimum and maximum cost to abate.
 - (d) Percentage of deterioration determined by the formula approved by City Council.
 - (e) A photograph of the building.
 - (f) A case history of the building showing all references which will assist the court in arriving at a decision concerning action required to abate the nuisance.
 - (g) Recommendations.
7. The procedure set up by the City Council will direct the Corporation Counsel upon presentation of evidence mentioned in paragraph No. 6 by Board of Survey to proceed with the necessary legal steps to make effective the recommendations of the Board of Survey.
8. Only cases which in the opinion of the Corporation Counsel are clearly within the scope of nuisance abatement will be presented to the Court. The evidence will be conclusive enough to allow the appointment of a receiver without a hearing by a master. No funds will be available for master's fees.
9. City Council should by ordinance establish the procedure and authorize the method of determining the percentage of deterioration of buildings as required by the Cities and Villages Act.
10. The present Board of Survey should be authorized to complete evidence necessary to support Court action. The membership then should be enlarged by two licensed engineers or architects, one to be appointed by the city, the other by the owner, if he so desires.
11. The financing of repairs will be done by means of receiver's certificates payable from rent. This application will be limited and should be strengthened by two provisions of the State Statutes.
 - (a) A "Prior Lien" against the property including taxes to guarantee the repayment of the costs of necessary repairs.

- (b) A "Tax Moratorium" for five years on the added value to a building caused by alterations and repairs which do not increase the volume of the structure.
12. This type of receivership will undoubtedly have to be operated upon a very frugal basis and no receiver's fee can be paid. Semi-public neighborhood improvement groups of substantial property owners should sponsor the program. The West Central Association will agree to assume the supervision of such activities in its area without receiver's fees.
13. When buildings are dilapidated they are almost always tax delinquent. If a receivership is authorized to abate a nuisance the County Treasurer should be requested to appoint, under the Revenue Act, the same receiver to collect taxes after the building is put in condition and has paid off its rehabilitation liabilities.

As to item 1 we would suggest that it is not necessary to wait for the receipt of a complaint. In the protection of the health and safety of its people a city may search out nuisances which ought to be abated.

Items 2, 3 and 4 are not objectionable but it should be observed that in cases where the nuisance character of the premises is disputable the sending of a notice to the owner would contribute nothing to the accomplishment of the abatement since the notice would not obligate him to act unless the nuisance in fact existed and, if its existence is debatable, an adjudication of that fact would be necessary before the notice could have any effect.

As to item 5 we assume that the Board of Survey is that provided for in Section 2237 of the Revised Chicago Code, 1931. If that is so, directing the Board of Survey to proceed would result only in bringing about the kind of action provided for in that section of the code, notwithstanding, as we have pointed out, action of that kind in certain cases might be not only inadvisable but such as might subject the city to a liability for damages. Nor do we see any necessity for the second or "final" notice provided for in section (b) of item number 5. General observations to be made at the conclusion of our discussion of these items will show that nothing is to be lost by dropping item 5.

As to item 6 we find no objections excepting these: (1) It is not stated to whom the Board of Survey is to report, and (2) if the Board of Survey provided for in Section 2237 of the Revised Chicago Code, 1931, is to act officially in this matter the question directly arises whether it can take any action other than that provided for in the section of the code just referred to, and whether upon its report any action could be taken by others other than the action provided for in that section.

Item 7 is not objectionable provided that "the necessary legal steps" to be taken by the Corporation Counsel shall be the institution of equity proceedings to declare and abate the nuisance. The declaration of nuisances by the City Council are general. If the Board of Survey should declare specific premises to be a nuisance when the City Council has not done so specifically, and if the Board of Survey should have the power thereupon to make its findings effective through the action to be taken by the Corporation Counsel other than the institution of an equity proceeding, it might well be contended that the board was exercising council powers and if its action were provided for by ordinance or other act of the City Council it might equally well be contended that the City Council had delegated legislative power. Where, however, the declaration and abatement of a nuisance on specific premises is to be accomplished by an equity proceeding the necessary factual determinations are made by a court competent to make them and the questions herein pointed out are obviated by the fact that the board might validly be empowered to call upon the

Corporation Counsel to institute an equity proceeding in appropriate cases. We believe that item 7 should be read and applied jointly with item 8.

Item 8 would be essential in a suitable scheme of procedure. Cases of this kind necessarily present legal questions and these should be passed upon by the Law Department of the city and the direction mentioned in item 7 so far as it might be construed to require the Law Department to institute and carry on equity proceedings, which as a matter of law might be wholly inadvisable, would be objectionable on several grounds. More will be said of the subject matter of item 8 in the general discussion of procedure which is shortly to follow in this opinion.

Item 9 cannot be approved as it stands. The percentage of deterioration of a given building is a matter of fact. Since the percentage is established by statute there is neither occasion nor authority for establishing it by ordinance and it would seem that there is no more need of establishing by ordinance the method of determining this fact than exists in any other case where the action of a court is to be based upon a fact.

Item 10 is objectionable in that all the factual determinations upon which any action is to be based should be determined once and for all in an earlier stage of the procedure.

Item 11 so far as it proposes a "prior lien" law and a "tax moratorium" law raises serious and difficult constitutional questions which should be avoided if possible. Certainly for the time being and until the legislature can consider these matters, if they are to be considered, any abatement receiverships which may be undertaken will have to operate without the assistance of such laws. As to the matter of receiver's certificates more will be said herein shortly.

Items 12 and 13 involve matters which will have to be determined in each case as it arises and do not, as we view them, call for any opinion at this time.

The proposed procedure which has been discussed seems to confuse two separate and distinct kinds of situations: Those in which the manner of construction maintenance or operation of a building involves a violation of a specific provision of a health or fire ordinance (and to these should be added the provisions of the building code) and situations in which the building is unsafe or unsanitary because of its general condition independently of any violation of a specific provision of the health or fire ordinance or the building code—situations in which reliance will have to be upon the general declaration of the ordinance that unsafe and unsanitary buildings are nuisances. With reference to the first of these two kinds of situations, procedure for correction or abatement is of course in the care of the department charged with the enforcement of the ordinance violated in each particular case. We consider such situations to be outside the scope of those with which Dr. Black's letter is concerned and this opinion is therefore limited to situations of the second kind.

When it has been ascertained that a building is in such an unsafe or unsanitary condition as to be a public nuisance, the following steps should be taken to accomplish abatement:

First. Notice must be given to the owner in the manner provided by law and an opportunity afforded him to abate the nuisance by measures of his own adoption.

Second. When a reasonable time for abatement has expired (and what is a reasonable time must depend upon the special facts and circumstances of each particular case) and no action has been taken by the owner, a survey or investigation should be made so as to provide evidence,

sufficient to meet the requirements of technical proof, that the building in question is in fact so unsafe or unsanitary as to be a public nuisance.

Third. Where the evidence affords a basis for abatement through an equity proceeding a court of equity may be resorted to for appropriate relief by way of injunction and receivership or an order for demolition by the proper department of the city government.

That a court of equity has power to appoint a receiver in order to effect the abatement of a nuisance is established both by reason and by authority. In *Columbia Athletic Club. v. State* (1895) 40 N. E. (Ind.) 914 an equity proceeding was resorted to for the abatement of a nuisance and the court appointed a receiver to effect the abatement. Its action was approved on appeal in the following language (page 918 of the cited volume):

"But equitable remedies must be complete. The arm of equity is not shortened, but will reach out to secure full rights in the premises. The receivership being therefore necessary in order to secure full effect of the injunction, equity will not refrain from the appointment of a receiver for such purpose."

And in the case of *People v. Israelite House of David* (1929) 246 Mich. 606; 225 N. W. 638 it was said that:

"* * * when circumstances so require a receiver may be appointed to aid in rendering effective the injunctive relief granted by the court
* * *"

That case was also an equity proceeding for the abatement of a nuisance.

Since it is the public interest which must determine in every case the necessity for abatement it follows that the public interest must in every case determine also the manner of abatement. That the public interest would require in some cases abatement by rehabilitation rather than by demolition is pointed out in Mr. Haldeman's letter to Dr. Black by the following statement:

"However, in the slum areas of Chicago where a large percentage of the buildings under discussion are located it has been estimated that only about 20% are owner occupied. Surveys show that there are no available standard quarters for tenants thus dispossessed, and enforcing the ordinance to vacate would further complicate the housing problem in these areas. To abate a nuisance by vacating buildings under these conditions would work hardship in about 80% of the cases on a third party, the tenant."

In those numerous instances in which, as Mr. Haldeman points out, the forced vacation of the premises by tenants housed therein would increase the difficulties of the existing housing problem, the public interest would require abatement by rehabilitation rather than by demolition. Abatement by rehabilitation would merely require that the receiver do what would otherwise have to be done by the owner to effect abatement in compliance with the court's order.

It is to be borne in mind in this connection that a choice between methods of abatement is afforded only where the receiver commences to act after the owner has failed to abate the nuisance himself after sufficient opportunity to do so. The owner cannot be required to devote his property to dwelling purposes. He may board up the building if that will abate the nuisance or he may demolish it if he elects to do so.

With reference to the legal phases of the financing referred to in the 11th item of Mr. Haldeman's proposed procedure we call your attention to what was said by the Supreme Court of Illinois in *Knickerbocker v. McKindley Coal Co.* (1898) 172 Ill. 535. That was a proceeding instituted

to settle and adjust partnership interests in a hotel property including the hotel furniture. The court's receiver was permitted to continue the business and in this connection he incurred obligations including certain indebtedness for coal and groceries. The property concerned in the litigation was encumbered with a trust deed upon the hotel and the furniture and fixtures therein to secure an indebtedness of more than \$100,000. Questions arose concerning the priority of the receiver's operating indebtedness which he had no funds to pay. In deciding this question the court said (page 547):

"Such being the facts, what is the law applicable to them? 'When it becomes the duty of a court of equity to take property under its own charge, through a receiver, the property becomes chargeable with the necessary expenses incurred in taking care of and saving it, including the allowance to the receiver for his services. He is the officer and agent of the court, and not of the parties; and it is a right of the court, essential to its own efficiency in the protection of things so situated, to keep them under its control, until such expenses and allowances are paid or secured to be paid.' (*Beckwith v. Carroll*, 56 Ala. 12; *Beach on Receivers*, sec. 771; *High on Receivers*, sec. 796.) Mr. High, in his work on Receivers, at section 796, after stating the doctrine that, when a court of equity takes property under its charge by appointing a receiver, the property itself is chargeable with the necessary expenses of the receivership, says: 'And, in such case, the person, who, under the final decree of the court, acquires the property, or its proceeds, acquires it *cum onere* and chargeable with the amounts due to the receiver for services and advances.'

"The object of appointing a receiver is to preserve the property for the benefit of all parties interested. Sometimes this object is best attained by continuing a business. When this is done, the court has the right, although it should exercise such right with great caution, to make the expenses of such business chargeable upon the *corpus* of the property, if the income is not sufficient to pay the same. Of course, such expenses must be charged first upon the net income, but, when that is not sufficient, they may be charged upon the property itself, or upon its proceeds after sale. It has been held that, although this authority of a receiver to incur indebtedness, in order to keep the business a 'going concern' until the rights of the parties are adjusted and a sale is effected, ordinarily arises only in cases of railroad companies; yet the same rules may be applied in other cases under like circumstances. (*Hopfensack v. Hopfensack*, 61 How. Pr. 498; *Ellis v. Vernon Ice, Light and Water Co.*, 86 Tex. 109; *Espuella Land and Cattle Co. v. Bindle*, 11 Tex. Civ. App. 262.)

"In *Thornton v. Highland Avenue and Belt Railroad Co.*, 94 Ala. 353, a receiver was appointed, who was authorized to conduct and run a hotel, and, while he was operating the hotel, he became indebted for groceries; and it was there held, that such debt constituted a proper charge, first on the income of the property, and then upon the *corpus*. It was there said: 'The party contracting with the receiver looks to the *rem*, the fund or property *in gremio legis*, backed by a pledge of the court that it shall be liable for all costs and expenses legitimately incurred in pursuance of its orders and decrees. * * * Under such conditions, the court should never surrender its custody of the property, or discharge the receiver, until all obligations incurred by him in the proper discharge of his duties has been adjusted and provided for. * * *'

In the case of *Pittsburgh Plate Glass Co. v. Kransz* (1920) 291 Ill. 84, proceedings were instituted to enforce a mechanic's lien against property upon which there was an uncompleted building. The court appointed a receiver to complete the building and for that purpose to borrow \$4,200 and to issue receiver's certificates for that sum, due in three years, and secured by a receiver's trust deed. The Supreme Court of Illinois held

the receiver's trust deed to be a first and prior lien on the property, saying (page 93):

"* * * Under and by virtue of the order the receiver borrowed the money and expended it in the completion of the building, which must have been known to defendants in error. Their right now to be heard in opposition to that order and decree is, to say the least, doubtful. (*Humphreys v. Allen*, 101 Ill. 490.) Presumably the court was of opinion the order was for the best interests of all the parties interested, and we are of opinion the order is controlling in determining the priority of liens, and the circuit and Appellate Courts erred in holding otherwise.

"It cannot be said from this record that the order was even erroneous. In *Knickerbocker v. McKindley Coal Co.*, 172 Ill. 535, the court quoted with approval from *Beckwith v. Carroll*, 56 Ala. 12: 'When it becomes the duty of a court of equity to take property under its own charge through a receiver, the property becomes chargeable with the necessary expenses incurred in taking care of and saving it, including the allowance to the receiver for his services. He is the officer and agent of the court and not of the parties, and it is a right of the court, essential to its own efficiency in the protection of things so situated, to keep them under its control until such expenses and allowances are paid or secured to be paid.' The court also quoted *High on Receivers* to the same effect. This court in the *Knickerbocker* case said, in substance, the object of appointing a receiver is to preserve the property for the benefit of all interested, which sometimes requires continuing a business; and it was further said the court had the right which should be exercised with great caution, to make the expense of the business chargeable upon the *corpus* of the property when the income was not sufficient to pay it. The court further said such powers were ordinarily exercised in cases of railroad companies, yet the same rules apply in other cases under like circumstances. This is sustained also in *Makeel v. Hotchkiss*, 190 Ill. 311, and *Town of Vandalia v. St. Louis Vandalia and Terre Haute Railroad Co.*, 209 id. 73. The property here involved was untenable and producing no income. The court determined it was for the best interests of all parties that it be completed. The owners were unable to complete it, and that could only be done through the appointment of a receiver with power to complete the building, and he could only do that by borrowing money for that purpose.

"Under the facts and circumstances of this case we are of opinion the trust deed of Peter P. Kransz securing the receiver's certificates should have been made a first lien and the claims of defendants in error should have been made second liens."

If in an equity proceeding reliance is to be placed upon the foregoing decisions it is indispensable that each and every person, firm and corporation whose rights, titles or interests will be affected by the priority of the receiver's obligations, should be made a party defendant to the proceeding and no receiver's obligations should be incurred in excess of a demonstrable addition to the value of the property by the rehabilitation for which the funds represented by his obligations are expended until in each instance an opinion is obtained as to the priority which the receiver's obligations in such a case would possess.

When an equity abatement proceeding has been instituted the opportunity to be given the owner to abate the nuisance himself is a matter for the court's decision in each case.

In a case where the owner is without funds to effect abatement either by rehabilitation or by demolition, and is willing to cooperate, the proceedings may be expedited by an early filing of his answer in the case or by admissions or discovery obtained by the procedure provided for in Rules 18 and 19 of the Supreme Court of Illinois governing practice in

the trial court, or by admissions in open court upon the hearing of a motion for the appointment of a receiver, that procedure being adopted which the circumstances of each case may suggest.

Other phases of the practice and procedure to be followed in bringing the equity proceedings to a conclusion will follow the usual course and there is no necessity for a detailed discussion of them in this opinion.

III.

The third point presented in Dr. Black's letter involves the inquiry, "If the procedure as suggested is not adequate, what additional steps are necessary to establish the right of a public or semi-public agency to abate the nuisance in equity?" This point, so far as it pertains to the procuring of abatement by the city, is sufficiently dealt with in our discussion of the preceding point. So far as it relates to "the right" of a "semi-public agency to abate the nuisance" the inquiry requires us to state that the power to abate, or procure abatement in equity, is in the city and it cannot be delegated to or exercised by a "semi-public agency."

IV.

A fourth point presented by Dr. Black's letter is, "Where a structure is unoccupied, more than 50 per cent deteriorated, and open to the public, it attracts children, vagrants and vandals. Can such a structure be considered an attractive nuisance and be abated by equity action?" "An attractive nuisance" is an object, in itself dangerous, possessing qualities which appeal to the playful or inquisitive instincts of children and by this appeal lure them to a contact with danger, causing their injury. The legal effect of the "attractive nuisance doctrine" is to permit a recovery for injuries to a child received in circumstances which, excepting for this doctrine, would make the child a trespasser. We do not think that questions of "attractive nuisance" arise in situations to which Dr. Black's letter refers, nor do we think that the question whether an "attractive nuisance" exists is important. If a public nuisance exists there is occasion for abatement; if the nuisance is not public, abatement cannot be procured. Public nuisances may include some "attractive nuisances" in the technical sense of that term but an "attractive nuisance" which is not also a public nuisance is outside the scope of this opinion.

As regards buildings damaged by fire, decay or otherwise to the extent of fifty per cent of the value, Section 65.61 of the Cities and Villages Act of Illinois (Ill. Rev. Stat., Ch. 24, Sec. 65.61) provides as follows:

"The city council, and the president and trustees in villages, for the purpose of guarding against the calamities of fire, shall have the power to prescribe the limits within which wooden buildings shall not be erected or placed, or repaired, without permission, and to direct that all and any buildings within the fire limits, when the same shall have been damaged by fire, decay or otherwise to the extent of fifty per cent of the value, shall be torn down or removed and to prescribe the manner of ascertaining such damage. * * *

It has been held by the Supreme Court of Illinois that in proceeding under this division of the statute, city authorities must in the first instance direct the owner to tear down the building. *Village of Louisville v. Webster* (1884) 108 Ill. 414. In that case the court said:

"* * * The power granted is not to tear down and remove the building, nor to cause the building to be torn down and removed, but to direct that it shall be torn down and removed. This implies, we think, that some person is to be directed to do this, and the person contemplated was, in our opinion, the owner of the building. This is

the reasonable construction. The owner of the building being in no fault whatever, having erected his building before the establishment of fire limits, and not knowing that his building would be considered a nuisance until after there had been ascertainment, by judicial inquiry, of the extent to which it had been damaged, it would be quite rigorous, immediately upon the ascertaining of such damage, to proceed to make sale of or tear down and remove the building, without affording the owner an opportunity of preparation for the event by first notifying him to make the removal himself."

It is our opinion that even in such a case the equity proceeding hereinbefore outlined should be resorted to.

V.

The fifth point presented to us by Dr. Black's letter is: "Considerable research work has been done in other states and cities, resulting in new laws to assist public officials in rehabilitating and demolishing deteriorated structures. Is it possible for the Corporation Counsel to make a study of recent laws in effect elsewhere for the purpose of recommending the passage of similar laws applying to conditions in Chicago?"

In the vast volume of legislation dealing with Substandard Housing we were able to find nothing suggesting any legislation which we could recommend for submission to the General Assembly of Illinois. In our opinion several important provisions of the legislation in other states on this subject, if not unconstitutional, at least create occasion for litigation questioning their constitutionality. Any plan which required or invited litigation to establish its validity seemed to us to be one which should be avoided if possible. It is possible, in our opinion, to proceed without reliance upon new and questionable legislation and to accomplish the objectives suggested in Dr. Black's letter, substantially at least, by resorting to procedures established in our law, in the manner and to the extent heretofore outlined herein.

In conclusion we desire to state that this opinion is not to be construed as relating to emergency situations created by buildings so eminently dangerous to public health or safety as to require their immediate demolition.

ABATEMENT OF BUILDINGS DEEMED NUISANCES

(No. 10153—Committee on Housing—A. F. G.—November 29, 1939
—4 pp.)

The City Council may by ordinance declare a specific building is a nuisance and direct the Commissioner of Buildings to tear down or have torn down said building if said building is a nuisance in fact, and the owner after notice has failed to abate the nuisance.

In order to obviate any question of validity of the Council's declaration of a nuisance, it would be advisable to institute equity proceedings so that the court may declare the premises to be a public nuisance, except that more direct action should be taken in cases so urgent that failure immediately to abate would seriously endanger life and limb. Such equity proceedings to abate nuisances may be instituted by the Corporation Counsel on his own motion or upon direction of the City Council or department heads.

Citations:

Ordinances: Mun. Code: 13-22 to 13-24, 96-10.

Cases: *People v. City of Chicago*, 280 Ill. 576 (1917).

City of Bushnell v. Chicago, B&Q RR. Co., 259 Ill. 391 (1913).

Chicago v. Weber, 246 Ill. 304 (1910).

Sings v. City of Joliet, 237 Ill. 300 (1908).

Other reference: Op. Corp. Coun. (No. 10099), this volume, p. 164.

OPINION OF FOREGOING SYNOPSIS

On November 16, 1939, you sent to this office copy of ordinance used by the City Council declaring a building to be a nuisance, with a letter requesting the following information:

"Is this form correct as to legality?

"How can we give it effect?

"Does the City Council have the power to direct the Corporation Counsel to institute proceedings for the abatement of a nuisance declared under this form?

"Can you furnish us with a form of ordinance which may serve as a basis in getting court action, if necessary, in cases of this kind?"

The form of ordinance is as follows:

"WHEREAS, The building located at No. is in a very precarious and dangerous condition; and

"WHEREAS, The structure is a nuisance and creates a hazard to the people in this vicinity; therefore,

"BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CHICAGO:

"SECTION 1. That the building now located at No. be and the same is hereby declared a nuisance, and the Commissioner of Buildings is hereby authorized and directed to tear down or have torn down the said building.

"SECTION 2. This ordinance shall take effect and be in force from and after its passage and approval."

Answering your questions in the order they are presented we are of the opinion that the form of ordinance is legal if the building specifically declared to be a nuisance is a nuisance in fact and the owner after notice has failed to abate the nuisance. The power of a city to define and declare nuisances does not extend to declaring anything a nuisance which is not a nuisance in fact. *People v. City of Chicago*, (1917) 280 Ill. 576; *City of Bushnell v. Chicago, B. & Q. R. R. Co.*, (1913) 259 Ill. 391; *City of Chicago v. Weber*, (1910) 246 Ill. 304. And if a city declares property to be a nuisance and destroys it when, in fact, it is not a nuisance, the city is liable for damages sustained by the owner. *Sings v. City of Joliet*, (1908) 237 Ill. 300.

Section 96-10 and Sections 13-22, 13-23 and 13-24 of the Municipal Code of Chicago provide the means of abating nuisances arising respectively from unsanitary or unsafe buildings.

In many cases after the Council has declared a dilapidated building a nuisance the Building Commissioner has found the building structurally sound and safe and refuses because of the liability which attaches to the City, to demolish the building in such case without an order of court.

In view of the practical difficulty of determining just when a dilapidated building is unsafe or unsanitary, it would be advisable in order to obviate any question of the validity of the Council's definition or declaration of

a nuisance, except in cases so urgent that failure immediately to abate would seriously endanger life and limb, to institute equity proceedings and present competent evidence of the unsafe or unsanitary condition of the premises so that the court in its decree may make the necessary findings, based on sufficient evidence declaring the premises to be a public nuisance.

In an opinion to Dr. Bundesen, Chairman, Committee on Substandard Housing, dated September 16, 1939, on this subject, we said:

"When it has been ascertained that a building is in an unsafe or unsanitary condition as to be a public nuisance, the following steps should be taken to accomplish abatement:

First. Notice must be given to the owner in the manner provided by law and an opportunity afforded him to abate the nuisance by measures of his own adoption.

Second. When a reasonable time for abatement has expired (and what is a reasonable time must depend upon the special facts and circumstances of each particular case) and no action has been taken by the owner, a survey or investigation should be made so as to provide evidence, sufficient to meet the requirements of technical proof, that the building in question is in fact so unsafe or unsanitary as to be a public nuisance.

Third. Where the evidence affords a basis for abatement through an equity proceeding a court of equity may be resorted to for appropriate relief by way of injunction and receivership or an order for demolition by the proper department of the city government."

The Corporation Counsel is the chief law officer of the City and by law is authorized "to conduct all of the law business of the City," and can on his own motion, or by direction of the City Council or department head institute proceedings for the abatement of a nuisance.

In answer to your last question we do not think any particular form of ordinance is necessary in getting court action in cases of this kind.

DEMOLITION OF BUILDINGS BY CITY

(No. 10101—Commissioner of Public Works—A. J. R.—September 16, 1939—5 pp.)

The City ordinances provide for demolition of buildings by the Department of Public Works only at the direction of the Building Commissioner or the Board of Health and an equity proceeding for the purpose of securing demolition of a building could not be resorted to except at their direction. If the demolition is under the supervision of the court's receiver, the salvage would be the property of the receiver and could be transferred to the City only by an order of court.

Citations: Mun. Code: 12-27, 13-22 to 13-24, 96-10.

DEMOLITION WHERE PARTY WALL INVOLVED

(No. 9936—*Engineer in Charge of Demolition*—A. F. G.—December 27, 1938—3½ pp.)

The owner of a building, the dividing wall of which is a party wall, may authorize the City to remove his building without liability to the adjoining owner, unless the party wall agreement provides for mutual lateral support or contains a provision that one owner cannot remove his building without the consent of the other. However, proper notice must be given the adjoining owner and reasonable care used to protect the wall and remaining building.

The City may take down a part of a party wall and leave the remainder standing without incurring liability for subsequent erosion or deterioration, and without being responsible for "finishing off" the part left, unless the wall in question was created by agreement having no limitation as to time. Where such a provision exists, the owner for whom the City acts could not consent to the removal of the wall without the concurrence of the co-owner.

The City can be required to furnish labor and material for complete repair of a party wall which is damaged inadvertently or carelessly in the course of operation.

Citations:

- Cases: Clemens v. Speed, 93 Ky. 284 (1892).
Bicak v. Runde, 138 NY Supp. 413 (1912).
Fisher v. Seaboard Air Line R.R. Co., 102 Va. 363 (1904).
Demers v. Lemieux, Quebec 21 CS 26 (1900).
Thompson v. De Long, 267 Pa. 212 (1920).
Maypole v. Forsyth, 44 Ill. App. 494 (1892).
Cronin v. Dougherty, 100 Pa. Superior 463 (1930).
Other reference: 47 CJ 1328.

OPINION OF FOREGOING SYNOPSIS

On December 2, 1938 you asked advice as to questions regarding party walls which arise in connection with your demolition program. You specifically ask: "When there is a party wall agreement what is the City's responsibility upon removal of one building?"

If there is nothing in the party wall agreement requiring each party to furnish lateral support to the building of the other or in the absence of anything prohibiting it, the owner of a building the dividing wall of which is a party wall may remove his building upon notice without liability to his co-owner for damages in the absence of negligence.

Clemens v. Speed (1892) 93 Ky. 284,
Bicak v. Runde (1912) 138 N. Y. Supp. 413,
Fisher v. Seaboard Air Line R. Co. (1904) 102 Va. 363,
Demers v. Lemieux (1900) Quebec 21 C. S. 26,
Thompson v. DeLong (1920) 267 Pa. 212,
Maypole v. Forsyth (1892) 44 Ill. App. 494,
Cronin v. Dougherty (1930) 100 Pa. Superior 463.

In the Kentucky case cited the court held that the owners of a party wall do not have a reciprocal easement of support from each other's buildings, but either of them may remove his own building without liability for resulting damage to the other, provided he gives proper notice of the removal and uses reasonable care and caution to protect the wall and remaining building.

You next ask: "When there is no party wall agreement, what is the City's responsibility upon removal of one building?"

You evidently mean "no party wall agreement" of record for a party wall in the legal sense of the term can be created only by virtue of a contract between the adjoining owners or by force of statute. There must be an agreement either expressed or implied. The party wall status may also be acquired by prescription but since a right so acquired presumes an agreement or a grant thereof, even in such case the right may be said to have been created by contract. 47 Corpus Juris, p. 1328.

In such a case it would be the duty of the city to ascertain the terms of the agreement. Unless the agreement provided for mutual lateral support or contained a provision that one owner could not remove his building without the consent of the other, the owner of one building could authorize the city to remove his building without liability to the adjoining owner provided proper notice was given his co-owner and the work done without negligence, *Clemens v. Speed, supra*.

You next inquire: "Can we take down a part of a party wall and leave remainder standing without incurring liability on the part of the City for subsequent erosion, or deterioration, and without responsibility to 'finish' or complete a workmanlike job of 'finishing off' the part left."

That would depend on circumstances. If the wall in question was created by agreement without limitation as to time, the owner for whom you act could not consent to the removal of the wall without the concurrence of his co-owner. If such consent is had your only duty is to use due care in taking down the wall unless the consent agreement provides otherwise. All of the cases cited above hold that an owner, without negligence, may take down his building without liability to his adjoiner for leaving the party wall exposed.

Your last question is: "If in the case of damage done inadvertently, in the course of operation, a party wall is damaged, the City can be required to furnish labor and material for complete repair."

We think the city would be liable in such a case. Webster defines "inadvertence" as "An effect of inattention; a result of carelessness; an oversight, a mistake or fault from negligence." If the work is done heedlessly, carelessly or thoughtlessly all of which terms are synonymous with "inadvertently" the city would not be exercising that degree of care necessary to render it immune from liability.

Opinion No. 9878 to the Commissioner of Public Works, dated August 26, 1938, holds substantially the same as the above opinion.

REHABILITATION OF SUB-STANDARD BUILDINGS

(No. 9952—*Chairman, Mayor's Committee on Sub-standard Buildings*
—A. F. G.—February 2, 1939—2 pp.)

The City has power, under its ordinances, to order the rehabilitation of buildings which are in an unsanitary, unsafe or dangerous condition,

or which in any manner endanger the health or safety of a person and if the owner of such a building fails, after proper notice, to make such repairs as will put the building in a safe or sanitary condition, the City may order its vacation.

The City does not have power to compel, without regard to standards set up by the ordinances of the City, the rehabilitation of buildings which do not meet the standard set up by the Committee on Sub-standard Buildings.

Citations: Code '31: 1702, 2236, 2237, 2383 to 2412 and 2480.

Coun. J. 7-13-38, pp. 6424, 6425, 6427.

Building Code ordinance, secs. 201.06 (a) to (c), 201.07 (c), 201.18.

WRECKING PERMITS FOR BUILDINGS IN HOUSING PROJECT

(No. 9769—Commissioner of Buildings—M. D. S.—February 3, 1935—2 pp.)

A release or authorization for the demolition of buildings in a housing project furnished by the Commissioner of Public Works, the authorized representative of the United States government, which owns the buildings, is sufficient authority for the Commissioner of Buildings to issue wrecking permits for the buildings in the housing project.

Citation: Code '31: 1197.

WRECKING PERMIT TO FEDERAL AGENCIES AND CITY DEPARTMENTS

(No. 9780—Commissioner of Public Works—A. F. G.—February 18, 1938—2½ pp.)

The Civil Works Administration or any similar Federal agency with power to co-operate with the City in the making of public improvements, the City Department of Public Works, the Department of Streets and Electricity, and the Fire department may wreck buildings and other structures, whether publicly or privately owned, and when any of these agencies applies for a permit to wreck a building or other structure, it is the duty of the Commissioner of Buildings to issue the permit without charging a fee and without requiring the filing of a bond to indemnify the City against any loss or damage.

Citation: Code '31: 1197.

APPLICATIONS FOR NEW BUILDING MATERIALS

(No. 10126—City Clerk—M. A. G.—November 1, 1939—2 pp.)

All applications for approval of new building materials or methods of construction not provided for in the building provisions of the Municipal code of Chicago should be made to the City Clerk who then transmits them to the Committee on Standards and Tests.

Citations: Mun. Code: 41-1, 41-2.

**USE OF FIRE RESISTIVE MATERIALS NOT SPECIFIED
IN NEW BUILDING ORDINANCE**

(No. 9851—Chairman, Commission for Revising the Building Code—A. F. G.—June 27, 1938—5½ pp.)

The City Council should adopt some provision which will permit the use of fire resistive materials not enumerated in the new building ordinance, but which have been proved by the standard fire test defined in the ordinance to have the fire resisting values required by the ordinance. Otherwise, the section enumerating the fire resistive materials which may be used in building construction may be held invalid by the courts as unjust and oppressive in its discrimination.

Citations:

Ordinances: Chicago Building code, secs. 302.02, 3201.03.

Cases: McCray v. Chicago, 292 Ill. 60 (1920).

City of Marion v. Robertson, 84 Ill. App. 113 (1899).

REGULATING CONSTRUCTION OF BUILDINGS OUTSIDE CITY

(No. 9992—Alderman, 41st Ward—M. H. F.—May 1, 1939—2 pp.)

The City has no power to prevent the construction of frame buildings outside of its territorial limits as its extra territorial power is limited to those powers specifically authorized.

Citations:

Statutes: Cities and Villages act, art. V, sec. 45, 61 to 63, 79, 81.

Cases: City of Rockford v. Hey, 366 Ill. 526 (1937).

Strauss v. Town of Pontiac, 40 Ill. 301 (1866).

ERECTION OF SOY BEAN SILOS

(No. 10095—Sergeant at Arms of the City Council—A. F. G.—September 11, 1939—2 pp.)

The City has no express power to limit or restrict the storage of soy beans. If there is no extraordinary health hazard or peculiar fire hazard involved in the storage of soy beans, an ordinance prohibiting

the erection of soy bean storage silos within a distance of 1000 feet of any private dwelling would be of doubtful validity.

Citation: Cities and Villages act, art. V, sec. 65.

REGULATION OF WINDOWS—LIMITATION OF BASEMENT APARTMENTS

(No. 9758—*President, Board of Health—A. F. G.—January 17, 1938*
—6 pp.)

The President of the Board of Health should approve the Fenestra type steel casement windows for an apartment building, as the courts have held that the provision in the code which specifies the glass area and requires that the upper half be capable of opening applies to double hung sash windows and not to Fenestra type steel casement windows.

Windows in habitable rooms in class III and class VI buildings with double hung sash must have a total glass area of at least ten per cent of the floor area of the room and in no case less than ten square feet of glass area, have a top not less than seven feet from the floor, and be so constructed that at least the upper half may be opened to full width. The lower half may be stationary, and the President of the Board of Health may consider this fixed portion in computing the amount of glass area.

The President of the Board of Health should not disapprove plans for an apartment building which show two basement apartments, as section 1423 of the revised Chicago code of 1931, which allows only one apartment in each basement, has been held unconstitutional by a court.

Citations:

Ordinances: Code '31: 1241, 1415, 1422.

Cases: McCray v. Chicago, 292 Ill. 60 (1920).

People ex rel. Brewer v. Kelly, No. 37-c-7563 Circuit Court of Cook County.

PERMIT FOR BUILDING IN ALLEGED ALLEY

(No. 10116—*Commissioner of Buildings—H. R. P.—October 11, 1939*
—3½ pp.)

Where an alleged alley was not dedicated or conveyed by the owner of the property to the City nor was continuously used by the public as a street or alley, the City can acquire no rights therein. Therefore, the Commissioner of Buildings should issue a permit for a building on the property in question if the applicant is otherwise entitled to it.

B. FRONTAGE CONSENTS

SIGNATURES ON FRONTAGE CONSENT PETITIONS

(No. 9860—*Commissioner of Public Works—L. V. R.—July 18, 1938*
—1½ pp.)

Petitions for frontage consents requiring the consent of a majority of the property owners must be signed by the owners or their agents, who should have a power of attorney for that purpose. A corporation may sign by its duly authorized officers. A manager has no authority to sign unless duly authorized to do so.

Citations: Code '31: 2670, 3274.

Opinion No. 9987 of April 17, 1939 to the Superintendent of Maps holds substantially the same as the above opinion.

FRONTAGE CONSENT PETITION SIGNED BY AGENT

(No. 10088—*Superintendent of Maps—M. H. F.—August 28, 1939*—
2 pp.)

When a trustee, by letter, has stated that the real estate agent has authority to sign the frontage consent petition, it would not be improper for the Superintendent of Maps to recognize the signature of the trustee signed by the real estate agent.

FRONTAGE CONSENT PETITION SIGNED BY TRUSTEE

(No. 10017—*Commissioner of Public Works—M. H. F.—May 23, 1939*
—2 pp.)

Filling station frontage consents must be signed by property owners and either all the trustees of a railroad should personally sign the petition or a trustee may sign on behalf of himself and other trustees if so authorized by resolution.

BUILDING SET BACK IN TRAILER CAMPS

(No. 9824—*President, Board of Health—A. F. G.—May 13, 1938*—
3 pp.)

The prohibition in the trailer camp ordinance against the location of a house-car trailer within fifteen feet of any street, alley, or property line or the erection of any building or other construction in this fifteen foot zone does not apply to a building belonging to the owner of the trailer camp and used for the business of the camp.

Citations: Code '31: 2274-I, 2274-J.

FRONTAGE CONSENT PETITION WHEN OWNERSHIP CHANGES

(No. 10091—*Superintendent of Maps—M. H. F.—August 31, 1939—3 pp.*)

If, in checking a frontage consent petition for a permit to install a tank, it is discovered that there have been changes in the ownership of property in the frontage area since the original signing, consents of the present owners should be obtained before such permit is granted. The signature of a former owner should not be credited for the required frontage.

Citations: 14 Op. Corp. Coun. p. 43.
18 Op. Corp. Coun. 580 (No. 8139).

**RECHECK OF FRONTAGE CONSENTS FOR GASOLINE
TANK INSTALLATION**

(No. 9755—*Assistant to the Mayor—M. H. F.—January 14, 1938—2½ pp.*)

The practice of the Fire Prevention Bureau to require a recheck of frontage consents before approving an application for a filling station license in those cases where a lapse of time longer than ninety days appears between the date of the gasoline tank installation permit and the filing of an application for a filling station license is reasonable and proper. This practice protects those property owners who may have acquired property within the area for which frontage consents are required since the date of filing the consents necessary for the issuance of the gasoline tank installation permit.

When a person has failed to erect a filling station and procure a filling station license for a period of time greater than eight years since the issuance of a gasoline tank installation permit, the law would impute laches and probably construe failure to act after receipt of the gasoline tank installation permit as tantamount to an abandonment of the filling station project.

Citations: Code '31: 3273, 3274.

Opinion No. 9794 of March 12, 1938 to the Division Marshal in charge of Fire Prevention holds substantially the same as the above opinion.

FEE FOR RECHECKING FRONTAGE CONSENT PETITIONS

(No. 9941—*Commissioner of Public Works—M. D. S.—January 5, 1939—1½ pp.*)

Where the rechecking of a frontage consent petition is necessary on the same matter before the petition is finally acted upon, only one verification fee should be charged.

Citations: Code '31: 201-a, as amended.
Coun. J. 8-5-37, p. 2414.

INTERPRETATION OF FRONTAGE CONSENT PROVISION RELATIVE TO GRANDSTANDS

(No. 9852—Commissioner of Public Works—L. V. R.—June 27, 1938—
4½ pp.)

A provision in the City code which requires "the consent in writing of the owners of a majority of the frontage on both sides of the street or streets on each side of the block or square," in which it is desired to erect a grandstand, should be construed to mean a majority of the frontage on each side of each street adjoining any part of the playing field on which the grandstand is erected, the entire length of each such street between the two nearest intersecting streets to be included, and each side of each street to be considered separately.

Citations: Code '31: 1323-b, 1677, 1678.

OPINION OF FOREGOING SYNOPSIS

In your letter dated June 17, 1938 you ask us to construe Section 1323 (b) of the Revised Chicago Code of 1931 which reads as follows:

"Every person, firm or corporation desiring a permit for the construction of a grandstand, except in connection with such as are now in existence, shall first obtain the consent in writing of the owners of a majority of the frontage on both sides of the street or streets on each side of the block or square in which it is desired to erect such grandstand."

The following questions are propounded:

1. Assuming that the site (of a playing field) is surrounded by four streets, shall the frontage be assumed as a majority of the total frontage of both sides of all four streets taken as a whole or shall the frontage be assumed as a majority of the total front of both sides of each of the four streets separately?
2. If the site (of a playing field) is at the intersection of two streets, would the frontage be assumed as a majority of the two sides of each street separately and, if so, shall only that part of the block be considered which is the actual frontage of the site and the same amount of frontage on the opposite side of the street or shall the frontage of the entire block be considered?
3. This question is similar to the second one as to whether the entire block should be considered or only that part of the block occupied by the site (of the playing field) and the same amount of frontage on the opposite side of the street.

The ordinance referred to relates to the construction of a grandstand only. The field is not involved and frontage consents are required only for each side of the block or square in which it is desired to erect a grandstand.

The word "block" is defined in Section 1677 of the Revised Chicago Code of 1931 for the purposes of "this ordinance" (presumably referring to Section 1678 requiring frontage consents for structures other than grandstands, although Section 1677 seems to be part of the Building Code in which Section 1323 (b) under consideration is included) so that it "shall not be held to mean a square, but shall be held to embrace only that part of a street bounding the square which lies between the two nearest inter-

secting streets, one on either side of the point at which such building or structure is to be erected, constructed, altered, enlarged or maintained, unless it shall be otherwise specifically provided."

The term "block or square" is not defined for the purposes of Section 1323 (b) of the Revised Chicago Code of 1931 now under consideration. Ordinarily the words "block" and "square" are synonymous. Without a definition to guide us, it is difficult to determine what was the intention of the City Council in regard to the subject of inquiry. Any interpretation we might place upon this ordinance cannot be reconciled with some of the language contained therein. If the phrase "block or square" were construed by its ordinary meaning all four street sides of a city square would be involved whenever the erection of a grandstand is desired. Such interpretation does not seem to be consistent with the language requiring a majority of frontage on both sides of the street or streets on each side of the block or square. Apparently the Council had in mind a situation wherein the consent of the owners of frontage on one street only would be sufficient. On the other hand, if the word "block" is interpreted to mean as defined in Section 1677 such interpretation would not fit the case of a grandstand erected on that side of a playing field which is not along side of a street.

For a proper interpretation of the section of the code in question it is necessary to have an understanding of the purpose of the frontage consent requirement. Since it is a part of the Building Code it would seem to have been the objective of the City Council to guard against danger from fire or damage from the nuisance of a grandstand in close proximity to other property. Certainly property immediately adjacent to a grandstand is more injuriously affected than property on the other side of an intervening street. To interpret the ordinance so as to require the consent only of the owners of property fronting on both sides of a street adjoining such grandstand, without taking into consideration the will of the owners of other property adjacent thereto, would bring into question the reasonableness of the ordinance.

The ordinance obviously suggests a fourth question not propounded by you, and that is whether each side of the street should be considered separately or whether both sides of the street should be considered as a unit in the computation of frontage consents. The ordinance requires the consent of a majority of the frontage on both sides of the street. If both sides of the street were treated as a unit the person desiring to erect a grandstand on all sides of a city square would be entitled thereto by securing the consent of the owner of one small fraction of the frontage across each street since the consent of the owner of the playing field would necessarily be given on the side of the field. Yet that would seem to be the literal, though absurd, interpretation of the language employed in the present ordinance.

We believe this ordinance requires revision so as to clearly express the intention of the City Council. Until such time as the ordinance is amended it would seem best to assume that for the purpose of determining whether consent of the owners of a majority of the frontage required has been secured (1) each street adjoining any part of the playing field is to be considered separately; (2) the entire length of such street between the two nearest intersecting streets is to be included; and (3) the frontage on each side of such street is to be considered separately.

FRONTAGE CONSENTS FOR UNDERTAKING ESTABLISHMENT

(No. 9818—*Board of Health—C. P. H.—November 8, 1939—3 pp.*)

A license may be issued to an applicant to conduct an undertaking business without filing a new frontage consent petition when the previous owner had obtained the requisite frontage consents to conduct an undertaking establishment.

Citations:

Ordinances: Mun. Code: 181-3.

Chicago Zoning ordinance, sec. 6.

Other reference: 18 Op. Corp. Coun. 578 (No. 6771).

**FRONTAGE CONSENTS FOR UNDERTAKING ESTABLISHMENT
ON TROLLEY BUS LINES**

(No. 10052—*President, Board of Health—C. P. H.—July 17, 1939—3 pp.*)

The frontage consent requirement for undertaking establishments in residential districts, although it does not apply to streets on which street cars are run, does apply to streets on which street car buses are run.

No such frontage consents are required for commercial districts.

Citations: Code '31: 3797.

Chicago Zoning ordinance, sec. 8.

Coun. J. (1936-37), p. 3282 (1937-38), p. 4538.

JUNK YARD ALONG STREET RAILWAY LINE

(No. 9783—*Commissioner of Buildings—M. A. G.—February 24, 1938—7 pp.*)

A yard that is to be used to receive discarded iron pipe, couplings and iron which is to be cut up and resold for scrap iron, the buying and selling to be in freight car shipments, is not a junk yard within the meaning of that term as used in the section of the zoning ordinance which prohibits junk yards along any street on which is located a street railway line.

Citations:

Statute: IRS '37, 24: 65.94.

Ordinances: Code '31: 3704.

Chicago Zoning ordinance, sec. 11, par. 6, sec. 14-A.

Cases: Chicago v. Northern Paper Stock Co., 337 Ill. 194 (1929).

Chicago v. Iroquois Steel and Iron Co., 284 Ill. App. 561 (1936).

Bullman v. Chicago, 367 Ill. 217 (1937).

Chicago v. Lowenthal, 242 Ill. 404 (1909).

Chicago v. Reinschreiber, 121 Ill. App. 114 (1906).

West Side Metal v. Chicago, 140 Ill. App. 599 (1908).

OPINION OF FOREGOING SYNOPSIS

In Re: Southeast Corner of Archer and Knox Avenues.

This is to acknowledge receipt of your letter of February 15, 1938, as well as that of David Bogolub, an attorney representing Harry Chernyk doing business as A-1 Pipe & Coupling Co., wherein you request that this office advise you whether Harry Chernyk is conducting a junk yard at the southeast corner of Archer and Knox avenues and if this is in violation of section 14-A of the Chicago Zoning Ordinance.

Quoting from your letter, we find that your inspector reports "that the yard is to be used to receive discarded iron pipe, couplings and iron, cutting it up and reselling it for scrap iron * * *" and also quoting from the Bogolub letter, "Mr. Chernyk deals only in pipe couplings and iron in large quantities, buying and selling in freight car shipments, * * *".

The southeast corner of Archer and Knox avenues is zoned as a manufacturing district and is known as an M-1 use in accordance with paragraph 6 of section 11 of the Chicago Zoning ordinance, which lists the following business that may be conducted:

wholesale lumber yard, retail or mill lumber yard, wood yard; the storage in bulk or in yard or in sheet of such products or materials as articles manufactured or in the process of manufacture, (except as otherwise classified), asphalt, bark, barrels, boxes, brick, cement, cord wood, cotton, contractor's equipment, crates, creosoted products, gravel, iron, junk, lime, machinery, pipe, plaster, rags, roofing, sand, scrap iron, scrap paper, stone, tar, terra cotta, timber, vehicles; or the storage of any other products or materials which do not emit dust, gas or odors of a disagreeable or annoying nature.

Archer avenue, which fronts the 'yard' of Harry Chernyk is a street car line and in accordance with section 14-A of the Chicago Zoning Ordinance, which reads as follows:

"14-A. It shall be unlawful for any person, firm or corporation to carry on or engage in the business of keeping a junk store or junk yard, upon any street in the city upon which is located a street railway line,"

it would be necessary, in order to sustain your right to interfere with the business of Harry Chernyk, that it be construed as a junk yard in accordance with the previous section.

The Revised Chicago Code of 1931, section 3704, defines the term "junk" as used in this article "shall be held to mean and include old iron, chain, brass, copper, tin, lead or other base metals, old rope, old bags, rags, waste paper, paper clippings, scraps of woollens, bagging, rubber and glass and empty bottles of different kinds and sizes when the number of each kind or size is less than one gross and all articles and things discarded or no longer used as a manufactured article composed of, or consisting of any one or more of the materials or articles herein mentioned."

The Revised Chicago Code of 1931, section 3704, defines the term "junk yard" as used in this article "shall be held to mean and include a yard, place or enclosure, other than a junk store as herein defined, where junk is bought, sold, bartered or exchanged, either at wholesale or retail, or where junk is collected, received, stored or held in possession for resale, barter or exchange, either at wholesale or retail."

Under section 65.94 of the Cities & Villages Act, article V of the Illinois Revised Statutes of 1937, the City of Chicago has the right to "tax, license, regulate and direct the location of all places of business of purchasers,

traders and dealers in junk, rags and any second-hand article whatsoever, and to forbid any person from purchasing or receiving from minors without the written consent of their parents or guardians any article, whatsoever."

The Supreme Court of the State of Illinois in the case of *City of Chicago v. Northern Paper Stock Co.*, 337 Ill. page 194, which was reported in 1929, stated that the "appellant contends that the business of buying from dealers, sorting, grading and selling bales of rags and papers in large quantities is not a junk business within the meaning of subsection 95 of section 1 of article V of the Cities and Villages Act, and hence that the City has no power to require it to obtain a license to carry on its business." Quoting further from this same case, the Supreme Court states that:

"The question of whether a certain business comes within the municipal power to tax, license and regulate granted by statute, must be determined by the general character and scope of the business. Subsection 95 of section 1 of article V of the Cities and Villages Act designates junk stores and yards as subjects which, under the grant of power, may be municipally regulated. The business of dealing in junk is a recognized commercial enterprise. In conferring upon cities and villages the power to tax, license and regulate junk stores, the General Assembly doubtless contemplated that the power would be exercised with respect to places of business commonly known and understood as such. The added power enabling a city or village to forbid a junk store buying or receiving any article from a minor without the written consent of his parents or guardian enforces this conclusion. A minor who has committed larceny can more readily dispose of the stolen article at a junk or second-hand store than at most other stores or shops. Junk stores, because of the nature of their business, are afforded peculiar opportunities to buy stolen goods. Upon this ground, the regulation of junk shops has been sustained as a proper exercise of the police power."

"Articles or materials collected by junk dealers and sold in junk stores may by their subsequent treatment in an independent business or occupation become of enhanced commercial value for ultimate use in another form. Such a business can hardly be designated as a junk store or yard. In *City of Chicago v. Lowenthal*, supra, it was held that a former Chicago junk shop ordinance requiring a license to keep a junk shop did not apply to a partnership engaged in the business of buying old metal in large quantities, melting it and then selling it, usually in carload lots, to mills and factories.

"A person who had no shop but bought from a certain number of carriage manufacturers the odds and ends of new iron left from larger pieces used in the manufacture of carriages and not available for that use, and who later sold the iron, was declared not to be a junk dealer. *Commonwealth v. Ringold*, supra.

"A city may not extend its power by a mere definition. *Emmons v. City of Lewistown*, 132 Ill. 380. Without a statutory grant of power, the commonly accepted meaning of a junk store cannot be extended by ordinance to include the business of buying rags and papers from dealers in large quantities, sorting and grading them according to quality, and selling them to mills and factories, usually in carload lots. In such a business, the materials are not collected, held or sold in the manner practiced by one operating a junk store or a yard."

The Supreme Court reversed the decision of the lower court requiring appellant to take out a license as a junk dealer.

In a later case decided in the Appellate Court of the First District for the State of Illinois, entitled *City of Chicago v. Iroquois Steel & Iron Co.*, 284 Ill. App. page 561, which business is similar to that of Mr. Chernyk, the Appellate Court stated in reversing the decision of the Municipal Court of

Chicago requiring appellant to take out a license as a dealer in scrap iron and steel that:

"After a careful consideration of the authorities cited by both parties, we are of the opinion that the *Northern Paper Stock Co.* case, *supra*, is precisely in point and controlling. The only difference between the two cases is that in the case at bar the material handled was scrap iron and steel whereas in the other case, defendants were dealers in assorted rags and paper. In both cases, sales were made to mills in carload lots or other large quantities and purchases were made in the same manner. According to the evidence in the instant case, defendant did not purchase from junk gatherers; it dealt in iron of various sorts and grades, and steel, exclusively, and bought from junk dealers in carload lots and in large quantities only. If the ordinance in the *Northern Paper Stock Co.*, *supra*, was not applicable to that defendant's particular business, it would logically follow that the ordinance is not applicable to defendant's business in this proceeding because the business of both defendants was *similar* with reference to the manner in which they purchased and disposed of the merchandise in which they were dealing. Scraps of new iron and steel left from manufacturing processes, and iron and steel recovered from buildings being wrecked and from parts from automobiles cut to sizes to meet the specifications of steel mills and foundries, are not junk within the provisions of the ordinance and under the decisions cited."

In the latest case affecting this subject, *Bullman et al. v. City of Chicago*, 367 Ill. 217, decided October 22, 1937, some of the plaintiffs were engaged in the business of dismantling new and used automobiles, in the purchase of used automobiles of new and old models, and the dismantling of same to obtain parts. These plaintiffs attacked the validity of an ordinance regulating and licensing their business as dealers in second-hand articles. After reviewing the former decisions of the court construing section 65.94 of the Cities and Villages Act, the court said:

"It is contended, however, on behalf of the defendant, City of Chicago, that, by amendment, section 95 (65.94) of article V of the Cities and Villages Act is now an express grant of power to tax and regulate the businesses of the various plaintiffs herein. It is the contention of the defendants that the section, as amended, grants the power to municipalities to regulate, not merely junk dealers and second-hand dealers whose business is in the nature of junk business, *but also grants the power to regulate all dealers in any second-hand article, whatsoever.*"

The Court further said:

"In the most literal sense, it would be a misuse of terms to call a place of business a second-hand store where the dealing in second-hand material is merely an incident of the business, not an essential part of it, nor its principal purpose. We have heretofore refused to extend a junk or second-hand dealer ordinance to individuals who buy in large quantities, who perform a substantial service upon such items, or who purchase them only as an incident to their principal business."

The Supreme Court in holding this ordinance invalid in effect said:

"Under the statute authorizing city to tax, license and regulate dealers in junk, rags and 'any second-hand article whatsoever,' city could not under doctrine of *ejusdem generis* tax, license and regulate dealers in second-hand motor vehicles, trailers, tires, accessories and parts, since quoted words do not add another classification to several diversified groups, but add general limitations to preceding specific classes."

It is true that these cases went up to the Appellate and Supreme Courts on the proposition of licensing them as wholesale junk and second-hand

dealers, whereas the proposition that we are confronted with here is not one of license, but whether such a business is a junk yard. In view of the decisions of both the Supreme and Appellate Court in these cases, as well as the *City of Chicago v. Lowenthal*, 242 Ill., page 404, *City of Chicago v. Reinschreiber*, 121 Ill. App. page 114, *West Side Metal v. City of Chicago*, 140 Ill. App. page 599, we must advise you that the business of Harry Chernyk located at the southeast corner of Archer and Knox avenues is not a junk yard as contemplated by section 14-A of the Chicago Zoning ordinance.

FRONTAGE CONSENTS FOR TRAILER CAMP

(No. 9961—Acting President, Board of Health—A. F. G.—March 6, 1939—3 pp.)

A trailer camp may be located in a block zoned for commercial or industrial uses without frontage consents except where more than one-half of the buildings in the block are dwelling houses and apartments, in which case frontage consents are required from a majority of the property owners on both sides of the block and within 200 feet of any part of the lot upon which the camp is located.

If a block contains three buildings, two of which are used for residences, then frontage consents in writing should accompany the application for a license to establish a trailer camp since more than a majority of the buildings within 200 feet of said camp are used for dwelling purposes.

Citations:

Ordinance: Code '31: 2274-e, 2274-l, 2274-j.

Other reference: Op. Corp. Coun. (No. 9824), this volume, p. 185.

Opinion No. 9824 of May 13, 1938, to the President of The Board of Health holds substantially the same as the above opinion.

OPERATION AND ESTABLISHMENT OF A SOFTBALL FIELD FOR PROFIT

(No. 10012—C. P. H.—May 19, 1939—2 pp.)

It is unlawful for any person to conduct a professional softball field without first obtaining a license and the written consent of the owners of a majority of the frontage on both sides of the street or streets on each side of the block in which it is desired to conduct such field.

Citations: Code '31: 1893, 1894, 1905, 1907.

C. ZONING

ESTABLISHMENT OF BUILDING LINE

(No. 9740—Alderman, 41st Ward—A. A. S.—January 3, 1938—
1½ pp.)

If the property owners on a street desire to establish a building line, the proper procedure is for all of the property owners to sign an agreement establishing the desired building line and to present the agreement to the Superintendent of Maps and Plats.

PUBLIC HEARING ON ZONING ORDINANCE AMENDMENT

(No. 9835—Chairman, Committee on Building and Zoning—A. F. G.—
May 26, 1938—2 pp.)

An amendment to the zoning ordinance which neither imposes regulations nor creates districts is not subject to either the statutory or ordinance provisions requiring the holding of public hearings.

Citations:

Statutes: IRS '37, 24: 69.

Ordinance: Chicago Zoning ordinance, sec. 29.

COMMERCIAL PROPERTY IN AN APARTMENT DISTRICT

(No. 9978—Assistant to the Mayor—M. H. F.—April 11, 1939—1 p.)

The order of the Zoning Board of Appeals to remove all filling station appurtenances on premises located in an apartment district, applies to a light standard in the apartment district which is used to light a filling station located on adjoining property zoned for commercial uses.

RESTRICTIONS IN AREAS ZONED FOR APARTMENT USES

(No. 10110—Chief Engineer, Chicago Plan Commission—L. V. R.—
October 3, 1939—3 pp.)

All areas shown in white, without symbols, on the use district maps (except streets, alleys, rivers, canals and waterways) are zoned for apartment uses and are subject to the restrictions in the zoning ordinance with respect to nearby commercial and manufacturing districts.

Citations: Chicago Zoning ordinance, sec. 4(b), 10(d), 12(b), 12(c), 13.

UNDERTAKING ESTABLISHMENT IN APARTMENT DISTRICT

(No. 10130—*Board of Health—C. P. H.—November 8, 1939—3 pp.*)

The zoning ordinance prohibits the operation of an undertaking establishment in an apartment district and no undertaking establishment license should be issued for premises in an apartment district notwithstanding frontage consents were obtained, unless the applicant obtains a zoning variation from the Board of Appeals.

Citations:

Ordinances: Mun. Code: 181-3.

Chicago Zoning ordinance, sec. 6.

Other reference: 18 Op. Corp. Coun. 578 (No. 6771).

DISTANCE RESTRICTIONS IN USE DISTRICTS

(No. 10034—*Chief Engineer, Chicago Plan Commission—L. V. R.—June 16, 1939—2 pp.*)

A C-3 use may be permitted in a commercial district only on that part of the parcel which lies not less than 125 feet from an apartment or residence district and an M-2 use may be permitted in a manufacturing district only on that part of the parcel which lies not less than 400 feet from a residence or apartment district or not less than 125 feet from a commercial district, even when a parcel of land lying partly within and partly without the restricted area is in one ownership.

Citation: Chicago Zoning ordinance, sec. 10(d), sec. 12(b).

DRIVEWAY PERMIT AS AUTHORITY FOR COMMERCIAL USE IN APARTMENT DISTRICT

(No. 9962—*Alderman, 50th Ward—M. H. F.—March 6, 1939—2½ pp.*)

The passage of a Council order for driveways and the issuance of a driveway permit thereunder does not authorize the permittee to use any portion of a plot of ground zoned as part of an apartment district for commercial purposes. The permittee is chargeable with knowledge of the City's zoning ordinance.

Citation: Coun. J. (1938-39), p. 6910 (Council Order).

CHAPTER VIII

RELIEF

APPLICATION OF WOMEN'S EIGHT HOUR LAW TO CHICAGO RELIEF EMPLOYEES

(No. 9785—Commissioner of Relief—A. F. G.—February 25, 1938—
7½ pp.)

In the clause in the State act regulating the hours of employment of women, making the act applicable to cases of women working "in any public or private institution or offices thereof," the phrase "public institution" is used in the narrow sense to signify establishments for the care of unfortunate wards of the State, even though operated by a municipality, and not in the broad sense to signify the State and municipal corporations as public institutions created and existing by law or public authority. Therefore, women employed in the offices and stations of the Chicago Relief Administration are not subject to the act, but women employed in shelter houses which operate continuously, and which are in the nature of poor houses or almshouses, are subject to the act and may not work more than eight hours per day nor more than forty-eight hours in any one week.

Citations:

Statutes: Women's Eight Hour law, secs. 1, 1½.
IRS '37, 127: 2 to 5, 55, 112, 113, 200.
Ordinance: Code '31: 609a, as amended Coun. J. (1936-37), p. 1958.
Case: People v. City of Chicago, 256 Ill. 558 (1912).
Other reference: 32 CJ, pp. 942, 943.

OPINION OF FOREGOING SYNOPSIS

Your letter of February 7, 1938 in which you state that certain female employees of the Chicago Relief Administration are required to work in excess of the eight hours per day prescribed by the law governing the employment of women has been referred to the undersigned for consideration and reply.

You also state:

"Inasmuch as the responsibilities of our program, together with certain administrative restrictions, make it impossible to meet many unpreventable situations in any other way, I am wondering to what extent the relief administration is liable in permitting women members of the staff to work in excess of the legal number of hours per day. Will you please give me your opinion as to whether or not the Chicago Relief Administration comes under the provisions of this law?"

Section 1 of the Act referred to is as follows:

"§ 51. No female shall be employed in any mechanical or mercantile establishment, or factory, or laundry, or hotel, or restaurant, or barber shop or beauty parlor, or telegraph or telephone establishment or office thereof, or in any place of amusement, or by any person, firm or cor-

poration engaged in any express or transportation or public utility business, or by any common carrier, or in any public or *private* institution or *offices thereof*, incorporated or unincorporated in this State, more than *eight* hours during any one day *nor more than forty-eight* (48) *hours in any one week*. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than *eight* hours during the twenty-four hours of any day."

Section 1½ provides certain cases in which the provisions of Section 1 shall not apply.

The office of Commissioner of Relief is created by Section 609a, Article XV, Chapter 5 of the Revised Chicago Code of 1931 as amended. (Council Journal, July 1, 1936, p. 1958.) The employees of the Commission are employees of the City of Chicago.

The only phrase in Section 1 under which it might possibly be maintained that the act applies to female employees of the City of Chicago is:

"* * * or in any public or private institution or office thereof, incorporated or unincorporated in this State, * * *"

Corpus Juris in discussing the term "Institution" says:

"'Institution' is a large term, which may carry any one of several meanings according to the context. In its modern acceptance it is somewhat difficult to define its meaning. * * * In legal and colloquial use of the word admits of application to physical things. Thus sometimes the term is used as descriptive of the establishment or place where a business is carried on, and not as designating organized corporate bodies or associations." 32 C. J., pp. 942-943.

For several reasons we are of the opinion that it is in the latter sense that the words "public institution" are used in the Women's Eight Hour Act. First, if it were the intention of the legislature to make the act applicable to all females employed "by" the State or municipal corporations and not "in" the "public institution" created by these public bodies it would have been a simple matter to have made that intention manifest. By adding after the words "common carrier" the words "or by any governmental body" and omitting the words "public institution" the intention to include all females employed by governmental bodies would be clear.

Secondly, the legislature of this State has indicated in other legislation that it considers the word "institution," "state institution" and "public institution" as descriptive of the establishment or place where certain activities are carried on such as the care of the sick, the blind, and the insane, the incarceration of criminals and the education of youth, rather than as descriptive of the state or municipal corporation which creates them.

In 1917 the legislature enacted "The Civil Administration Code," Chapter 127 State Government, Ill. Rev. Stats. 1937. By section 2 of that Act the word "department" is defined to mean the several departments of the State Government as designated in section 3 of that Act. Section 3 of the Act creates ten Departments of the State Government, among which is The Department of Public Welfare. Section 4 provides that each department shall have an officer at its head who shall be known as a director to execute the powers and discharge the duties vested by law in his respective department. Section 5 creates certain executive and administrative officers, boards and commissions. Section 6 creates advisory and non-executive boards in certain of the departments, among which is created a Board of Public Welfare Commissioners in the Department of Public Welfare. Section 54 provides among other powers the Board of Welfare Commissioners shall have power and it shall be its duty:

"1. To investigate into the condition and managements of the whole system of charitable, penal and reformatory *institutions* of the State, including State hospitals, penitentiaries, reformatories, jails and almshouses."

Subparagraph 15 of section 55 of the same Act in reference to the Department of Public Health provides that the Department shall have power:

"15. To inspect from time to time, all hospitals, sanitarium, and other *institutions* conducted by county, city, village or township authorities, and to report as to the sanitary conditions and needs of such hospitals, sanitarium and institutions to the official authority having jurisdiction over them."

In section 112 of Chapter 127 it is provided:

"The Superintendent of Printing shall supervise the printing done in any of the charitable, penal, or reformatory institutions of the state and all of the mechanical equipment therefore. * * * The *institution* in which such printing or such binding or such printing and binding is done shall be paid therefore out of any appropriation made for printing and binding."

And in section 113 immediately following is this language:

"of the bound volumes of the public laws and of the bound volumes of the journals of both Houses of the General Assembly, respectively, one copy of each shall be sent to each state officer, board, commission, *institution* and department. * * *"

And in section 200 the last section of Chapter 127 is this provision:

"It shall be the duty of all departments, officers, *institutions*, boards, commissions and other State agencies to render to the Commission any assistance that may be required by the Commission for the purpose of preparing their report and recommendation pursuant to the Act."

From the foregoing distinction which the legislature makes between the departments, boards, commissions, and institutions of the State, we think that the legislature in using the words "public institutions" in the Eight Hour Law used them in their narrow and restricted sense as establishments for the care of the unfortunate wards of the State and not in the broad sense that the State, and municipal corporations are public institutions created and existing by law or public authority. A third reason for our contention is found in the well known rule of construction that where language is susceptible of more than one meaning in order to ascertain the legislative intent, we may consider the objective of the legislation and the evils to be remedied. In the Act in question it is apparently the intention of the legislature to limit the hours of employment in certain industries, establishments and occupations. In the enumeration of these are to be found those establishments where custom and practice have decreed long hours of employment such as factories, hotels, restaurants, telephone exchanges, hospitals, etc. The places of employment of a municipality have generally not been included in this class. Public offices generally have reasonable hours of employment, the period of employment usually being fixed by law or ordinance. But "public institutions" of a municipality such as hospitals, sanitarium, houses of correction, jails, etc., are in a different class. They are operated continuously, day and night, twenty-four hours a day and seven days a week. It is in establishments such as these that the abuses which the legislation aims to cure are generally to be found. It is reasonable to opine then that the legislature in using the words "public institution" intended to apply them to the establishments of the municipality enumerated above and not to apply them to the municipality itself.

This seemingly is the view of the Supreme Court of this State when in sustaining a conviction of the City of Chicago for permitting the employment of women in the "Isolation Hospital" for a longer period than that permitted by the Women's Ten Hour Act, the court said:

"The Women's Ten-hour law prohibits the employment of females in any 'public institution, incorporated or unincorporated, in this State, more than ten hours during any one day.' The act contains no exceptions that would exempt from its operation such institutions as the Isolation Hospital, owned and operated by the City of Chicago. The language of the act, we think clearly embraces such an institution, and as the danger to the health of females from requiring them to work therein more than ten hours a day is as great, so far as we are able to see, as requiring or permitting them to work in other prohibited lines more than ten hours, no reason is apparent for holding that the legislature did not intend the act to apply to public institutions of municipalities."

The People v. The City of Chicago, 256 Ill. 558-564.

We are not familiar with all of the departments and places of employment in the Chicago Relief Administration, but are of the opinion that the females employed in the offices, and stations of the administration are not subject to the Eight Hour Law. We think, however, that shelter houses which operate continuously and which are in the nature of poor houses or almshouses are such "public institutions" as would make the females employed therein subject to the Eight Hour Law.

ADVANCEMENT OF FUNDS FOR RELIEF

(No. 9791—*City Comptroller—J. F. G.—March 4, 1938—2½ pp.*)

It is the duty of the City Treasurer to comply with an order of the City Council to advance to the City relief fund a sum not to exceed \$1,910,000 out of any funds in the City treasury not immediately necessary for the purposes for which they were appropriated; the funds to be reimbursed from any available receipts and revenues of the City for relief, if it can be reasonably anticipated that the amount advanced will be repaid when needed.

Citations:

Statutes: IRS '37, 24: 103, 104.

Cases: Gates v. Sweitzer, 347 Ill. 353 (1932).

People v. Westminster Building Corp., 361 Ill. 153 (1935).

STATUS OF CONCESSION ON CRA PREMISES

(No. 10059—*Commissioner of Relief—E. L. M.—July 24, 1939—4 pp.*)

The Chicago Relief Administration is not responsible for the sanitary conditions existing in a concession operated on its premises by the blind of Illinois, as it has no part in the management of the enterprise and no control over the employees thereof. The CRA should cooperate with the Board of Health in the premises.

The CRA would not be liable for injuries sustained by employees of such concessionaire because the CRA is not the employer and also

because the administration of poor relief is the performance of a governmental function exempting the City from liability for injuries arising out of the performance of such function.

The CRA would not be liable for any fraud perpetrated upon a merchant by such concessionaire unless the merchant were led to believe he was dealing with the CRA.

The concessionaire would be liable in damages for injury to property resulting from his negligence or the negligence of his employees.

The CRA may permit an independent operator the use of CRA facilities to operate a business for profit if it is incidental to the administration of relief or enables a person on relief to earn his own living.

PAYMENT OF LEGAL SERVICES OUT OF RELIEF FUNDS

(No. 9975—*City Comptroller*—J. F. G.—April 7, 1939—2 pp.)

Legal services rendered in aid of the sale of tax anticipation warrants against poor relief levies cannot be paid for out of relief funds as such relief funds can be used only for purposes of administering relief. Such services must therefore be paid for from the general corporate fund.

Citations: Cities & Villages act, art. VIII, sec. 1.
Illinois Emergency Relief Commission act, sec. 2.

AGREEMENT WITH VETERANS' RELIEF COMMISSION

(No. 9863—*Commissioner of Relief*—A. F. G.—July 23, 1938—2½ pp.)

The Commissioner of Relief may lawfully enter into an agreement with the Veterans' Relief Commission of Cook County whereby the cases of five hundred veterans who are relief clients and who, the files indicate, are now, and probably will in the future be, unemployable are to be transferred to a selected part of the present veterans' relief station in order to separate them from other veterans' cases, the cases so transferred to be under the direction of the Veterans' Relief Commission and handled by personnel furnished by the Cook County Board, all under the supervision of the Commissioner of Relief. These cases will receive relief in accordance with identical standards which are in effect at the present time or which may be applied in the future, to all relief clients of like character:

The ordinance creating the office of Commissioner of Relief authorizes him to furnish relief by certain specified means and "by any other means deemed desirable by the Commissioner of Relief."

PROPERTY OF NO PRESENT VALUE OWNED BY RELIEF APPLICANTS

(No. 9800—*Commissioner of Relief*—A. F. G.—March 28, 1938—6 pp.)

If an applicant for relief possesses property which cannot be made available for his immediate needs, he is a pauper within the meaning of the law and is entitled to relief.

The Commissioner of Relief may not compel an applicant for relief as a condition precedent to receiving relief to assign, release, or mortgage property of no present value owned by the applicant or property which the applicant may receive in the future.

Citations:

Statute: Pauper act.

Cases: Albany v. McNamara, 117 NY 168 (1889).
Charleston v. Hubbard, 9 NH 195 (1838).
Montgomery County Poor Directors v. Nyce, 161 Pa. 82 (1894).
Fairbanks v. Benjamin, 50 Vt. 99 (1877).
Kennebunkport v. Smith, 22 Me. 445 (1843).
Tazewell County v. Cooney, 215 Ill. App. 617 (1920).
Dandurand v. County of Kankakee, 196 Ill. 537 (1902).
Christian County v. Rockwell, 25 Ill. App. 20 (1887).
Eshelman v. Clinton County, 88 Ill. App. 566 (1900).
Big Grove v. Fox, 89 Ill. App. 84 (1900).

Other reference: 48 CJ 430.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your letter of February 21, 1938 in which you ask advice in the following matters:

"a) If an applicant for relief is known to have a substantial share in an estate pending in the Probate Court which estate when received will make him self-sustaining but which because of the Probate proceedings cannot yet be utilized by him, may the Chicago Relief Administration require as a condition precedent to granting assistance the signing of an agreement for restitution, an assignment, or other instrument guaranteeing reimbursement for relief advances?

In all these cases we are satisfied by thorough investigation that the applicant is not able to raise funds through private credit.

"b) If an applicant for relief has pending a claim or a lawsuit, for personal injuries, for the recovery of property, or money due, or any other claim or action which may at a future date ripen into a resource, may the Chicago Relief Administration require from the applicant, as a condition precedent to granting relief, an assignment of his interest, not to exceed the amount of relief granted, in any money which may be received from the claim or suit pending at the time of application?

"c) If an applicant at date of application owns real estate (other than homestead) which is non-liquid and productive of no income, and the applicant is otherwise in necessitous circumstances, may the Chicago Relief Administration require as a condition precedent to granting relief a mortgage lien in favor of the Relief Administrator in an amount not to exceed the amount of relief furnished plus costs of foreclosure?

"As a corollary to the above, may assignments or pledges of 'frozen' real estate securities be required or accepted by the Chicago Relief Administration as condition precedent to relief?"

The general rule is that, so long as a person is possessed of property which can be made available for his support, he cannot be considered a "pauper" in the sense that the word is used in the statutes; but if the property which he may own cannot be made available for his immediate wants he is within the meaning of the statutes. 48 Corpus Juris 430.

The instances referred to in your letter seem to fall within the second part of this rule.

At common law a person receiving aid from the poor officers was under no liability to repay the same.

In *Albany v. McNamara*, 117 N. Y. 168, on this rule the court said:

"The possession of some property by a person does not always and necessarily preclude such person from a just claim for relief * * * and such aid, once furnished, must thereafter be regarded as a charity extended by the city to the object of their benevolence without expectation of reimbursement."

In *Charleston v. Hubbard*, 9 N. H. 195, holding that an action will not lie in favor of a town against a pauper to recover money expended for his support, although the pauper afterwards possesses property, the court said:

"Charitable relief afforded to an individual, although at his own request, gives no cause of action against him, even if he be afterwards of sufficient ability to repay. It is a gift and cannot be reclaimed."

In *Montgomery County Poor Directors v. Nyce*, 161 Pa. 82, *Fairbanks v. Benjamin*, 50 Vt. 99, and *Kennebunkport v. Smith*, 22 Me. 445, it was said that in the absence of statute there is no liability on the part of a pauper to pay for supplies or support.

A number of states now by statute make the estates of persons, supported while living as paupers, liable after their death for such support.

There is no provision in the Illinois Pauper act which makes the estates of persons supported as paupers liable for such support but the courts of this State have held them liable.

In one case a pauper became an inmate of a county farm in 1878 and lived there until he died in 1917, during all of which time he was supported by the county as a pauper. About February 17, 1913 he was granted a pension of \$24.00 per month, being a Civil War veteran. At the time of his death he had accumulated from this pension \$1,338.00, which sum comprised the assets of his estate at the time of his death. The county filed a claim against his estate which was allowed upon appeal to the Circuit Court for the sum of \$697.38, that sum being the actual cost of his maintenance from the time he began to receive his pension February 17, 1913 to the date of his death. In this case the court said:

"It is urged by appellant that Bradley having been received by the county in the County Farm as a pauper and maintained as such until his death, it being a charitable transaction, there could be no implied promise to make reimbursement to the county. The policy of this State as evidenced by the act in regard to paupers is that the relatives of persons, where circumstances have unfortunately placed them in such a class, should support them and not the public generally. When a pauper has no relatives who can support him, it is the duty of the county at public expense to supply such maintenance, but the county has no authority to support persons at public expense who are financially able

to maintain themselves. A person having sufficient means for his own support is not within the provisions of the law, making his support a public charge. *City of Alton v. County of Madison*, 21 Ill. 115. * * *

Tazewell County v. Cooney, 215 Ill. App. 617.

In the case of *Dandurand v. County of Kankakee*, 196 Ill. 537, it appeared that an insane person was returned to the Kankakee County Poor Farm and Insane Asylum from the State Hospital for the Insane. He had an estate of \$2,500.00 and his conservator, although he knew that his ward was being maintained by the County, did nothing to provide for him. The County brought suit to recover for the cost of his support and maintenance and recovered a judgment therefor in the County Court. In this case the Supreme Court held:

"He was in need of board, care and medical attention, and was obviously unfit to be at large, and the county furnished him that care. His conservator knew the facts and did not offer to provide for him elsewhere or take any steps to have any change made. We are of opinion defendant was impliedly liable for these necessities so furnished him."

It was urged in this case that, because the County had never made any attempt to charge him for his support, it will be presumed that it intended such support to be a charitable gift for which no recovery can be had. This contention was answered by the court as follows:

"We think the intention does not enter into the case where the support is by a public body. If he was liable for his own support under the law, there was no officer who could form an intention that gratuitous service should be rendered, which would bind the county and release defendant from liability."

In each of these cases the person cared for by the County had means ample to care for himself, and recovery was allowed.

The Illinois courts incline to the opinion that it is not necessary first to exhaust the property of poor persons before furnishing relief. *Christian County v. Rockwell*, 25 Ill. App. 20; *Eshelman v. Clinton County*, 88 Ill. App. 566; *Big Grove v. Fox*, 89 Ill. App. 84. However, in each of these cases the amount of property was small, almost negligible.

It is conceivable in the instances cited in your letter that property of great potential value, but on which nothing can presently be realized, may be owned by an applicant for relief. Under the rule cited above from *Corpus Juris*, "if the property which he may own cannot be made available for his immediate wants he is within the meaning of the statutes" a "pauper" and entitled to public relief.

During the recent depression many professional men, architects, doctors, lawyers, engineers, etc., with great potential earning power in normal times, were forced to apply for relief as "paupers." Can it be contended that such as these may be compelled to assign their future earnings to the city relief fund as a condition precedent to receiving relief? We do not think so. In our opinion, their cases are analogous to those cited in your letter and we think you would have no more right to compel the assignment, release or mortgage of property of no present value owned by relief applicants than you would have to compel the assignment of future earnings of professional men or wage earners who find themselves in such necessitous circumstances as qualify them to receive relief under the Pauper act.

FINGERPRINTING OF RELIEF APPLICANTS

(No. 9761—Commissioner of Relief—A. F. G.—January 21, 1938—
4½ pp.)

The City Council may, by ordinance, require the Commissioner of Relief to cause the fingerprinting of applicants for relief. The Overseer of the Poor, or Commissioner of Relief, has no power under the present statutes and ordinances to require such fingerprinting.

Citations:

Statutes: Pauper act, secs. 15b, 17a.

Ordinance: Code '31: 609d.

Case: United States v. Kelly, 55 Fed. (2d) 67 (1932).

Other reference: 19 Op. Corp. Coun. 200 (No. 9365).

OPINION OF FOREGOING SYNOPSIS

In your letter of January 12, 1938 you say:

"It has been proposed that the Chicago Relief Administration adopt a policy of requiring all persons receiving aid in shelters to be fingerprinted. It is assumed that due to such requirements many men who are now receiving temporary aid through this program would, for one reason or another, not qualify, thus reducing the number of persons served and also the program of care for this group of persons would be made even less attractive to them."

You quote a number of excerpts from an opinion rendered you by this office December 11, 1936 relative to the duties and responsibilities of the Commissioner of Relief in providing care to those persons who are found in need, and giving you our interpretation of the law.

Among the provisions of the act quoted in that opinion is section 17a, which provides for the appointment of an overseer of the poor or like officer and further provides that:

"* * * Such overseer or officer shall have the care and oversight of such poor and indigent persons as are not supported by their relatives or at the county poor farm and shall see that they are suitably relieved, supported and employed, subject to such restrictions and regulations as may be prescribed by the city council or board of trustees, as the case may be. * * *"

You then inquire:

"In view of this interpretation of the law, can the Commissioner of Relief make mandatory the fingerprinting of a given group of individuals classed as paupers and withhold relief because this requirement is not provided; or, in view of the fact that the pauper law provides for the securing of an affidavit relative to need, would it be necessary for the City Council, to pass such a regulation, in accordance with Section 17a, on page three of the opinion?"

Fingerprinting is the taking of an impression of the lines upon the finger in ink for purposes of identification. It is simply another method of identification such as photography, handwriting and measurements. It is used most generally for the purpose of identifying and apprehending criminals, but has come into use in many other activities as a means of identification.

Under United States Army regulations every enlisted man is required to be fingerprinted. The footprinting of new-born babies in hospitals has

become almost a universal practice. All appointees to the Federal Civil Service must be fingerprinted at the time of appointment. Many banks, trust companies and other business institutions use fingerprints for various purposes of identification.

Because fingerprinting has been associated more generally with the identification of criminals there has become attached to the process a stigma in the minds of many people. However, many other people have come to feel that fingerprinting is no more humiliating than any other means of identification that have been universally held to infringe neither constitutional nor common law rights. These people inquire if there is any difference in principle in the United States Government requiring successful applicants for Civil Service positions to be fingerprinted before appointment, and a rule requiring applicants for relief to submit to the same process of identification. In either case it may be necessary to protect the public body against fraud and impersonation.

In discussing this question the United States Circuit Court of Appeals, Second Circuit, said:

"Any restraint of the person may be burdensome. But some burdens must be borne for the good of the community. (Citing cases.) The slight interference with the person involved in fingerprinting seems to us one which must be borne in the common interest."

United States v. Kelly, 55 Fed. (2nd) 67.

In the same case the court at page 70 said:

"Fingerprinting is used in numerous branches of business and of civil service and is not in itself a badge of crime. As a physical invasion it amounts to almost nothing, and as a humiliation it can never amount to as much as that caused by the publicity attending a sensational indictment to which innocent men may have to submit."

However, it is the settled law of this State that there is no inherent power in municipal corporations or in their officers. All powers which they may exercise must be granted by express language or must be such as are reasonably necessary to carry out express powers granted.

Section 15b of the Pauper act requires an applicant for relief to furnish to the overseer of the poor a sworn statement of his condition and submit to a reasonable examination by the said overseer as to his inability to support himself or his dependents.

Section 17a quoted above, and which authorizes the city council to create the office of overseer of poor, provides also that in carrying out his duties he shall be "subject to such restrictions and regulations as may be prescribed by the city council."

In the ordinance creating the office of Commissioner of Relief of the City of Chicago the City Council in section 609d has provided:

"* * * It shall be the duty of the Commissioner of Relief to carefully investigate all applications for relief and to grant relief only in cases of actual need and to such poor and indigent persons as are legally entitled to relief."

Neither in the statutes or ordinances is there any restriction or regulation against fingerprinting applicants for relief. Neither is there any express power given to the Overseer or Commissioner of Relief to require the same. It is doubtful if it can be said that fingerprinting is reasonably necessary to protect the relief fund. Whether it is so necessary is primarily a question for the determination of a legislative body. No doubt the City Council could by ordinance require the Commissioner of Relief

to cause the fingerprinting of applicants for relief. It is your duty to safeguard the public funds appropriated for relief from fraud and imposition and, if in your judgment authority to fingerprint applicants is necessary to afford that protection, we would suggest that you request the City Council to amend the relief ordinance to that effect.

RELIEF TO APPLICANTS FALSIFYING APPLICATION

(No. 10149—*Commissioner of Relief*—P. J. L.—November 27, 1939—
2 pp.)

The Commissioner of Relief may deny relief to applicants who have made false statements in their sworn applications for relief, regardless of whether such persons had been convicted of perjury.

Citation: IRS '39, 107: 15b.

CONTRACT FOR PURCHASE OF FLUID MILK

(No. 10086—*Commissioner of Relief*—A. J. R.—August 25, 1939—
3 pp.)

The Commissioner of Relief may properly enter into an agreement with the Secretary of Agriculture of the United States for the purchase of fluid milk in the City when the agreement provides that milk may be purchased as desired, that it be delivered as a condition precedent to payment, that the quality of milk will be above that required by the Board of Health and that the agreement may be terminated upon notice of either party.

PLACING POOR CHILDREN IN HOMES OUTSIDE OF CITY

(No. 10122—*Commissioner of Relief*—A. F. G.—October 26, 1939—
4 pp.)

The City may contract for the support and care of children of the poor only with moral and discreet householders in the municipality. The City is prohibited from placing such children in foster homes outside the corporate limits of the City at public expense.

Citations:

Statute: IRS '37, 107: 21.

Other reference: 48 C.J., sec. 19.

OPINION OF FOREGOING SYNOPSIS

On October 13, 1939 you wrote as follows:

"Under date of August 7, 1939 you furnished to me an opinion relative to the practice of placing children, at public expense, in homes outside the City of Chicago. A letter dated September 29, 1939 from Mr. Jacob Kepecs, Chairman, Advisory Committee to Children's and Minors' Service, has been directed to this office. Mr. Kepecs has submitted certain information with his letter and states that he hopes that

you will find it possible to modify your opinion relative to this subject. Mr. Kepecs' letter and his enclosure are enclosed.

"May I request, therefore, that you review the material submitted by Mr. Kepecs and furnish me with your comments."

We have carefully studied Mr. Kepecs' letter and have read the cases submitted as authority for the position he takes. We do not agree with his view that section 14-a of the Pauper Act rather than section 21 is controlling in the matter of placing children in boarding homes. Section 14-a was added to the act in 1936 and imposes on cities of more than 500,000 inhabitants the duty of furnishing poor relief to poor and indigent persons lawfully resident therein just as sections 14 and 15 imposed the same duty respectively on counties not under Township Organization, and on the various towns in counties under Township Organization. The various sections of the act which follow these three provide by whom and in what manner these various political units shall furnish relief to poor and indigent persons lawfully resident therein.

Section 21 provides that the overseer of the poor in certain cases shall commit the care of such poor persons as shall require to be supported by the county, municipality or town, to some moral and discreet householder *in the municipality, town or precinct* capable of providing for them and who will enter into a written contract therefor on terms approved by the managing bodies of each of these political units as the case may be.

When the legislature in 1936 imposed the duty of poor relief upon the City of Chicago by the addition of section 14-a referred to above, it also amended section 21 by inserting the word "municipality" where it now appears in that section, to make sure that the provision authorizing contracts for support for poor persons with "some moral and discreet householder in the * * * town or precinct" should apply equally to cities as well.

Where a statute directs the performance of certain things in a particular manner or by a particular person it implies that it shall not be done otherwise nor by a different person. 59 Corpus Juris, p. 984.

Mr. Kepecs' interpretation of the Pauper Act completely ignores section 21 as if it were not incorporated therein. In the *Eshelman* case referred to by him there was nothing in the case to indicate that the pauper was ever outside of Clinton County. In the *Randolph* case also cited by Mr. Kepecs section 21 of the Pauper Act was apparently not called to the attention of the court as no reference is made to it. Certainly no court in view of the plain language of section 21 which limits contracts for support to "householders in the municipality, town or precinct" would say that contracts could be made with householders outside these communities without doing violence to the clearly expressed intention of the legislature.

In California a statute limited the authority of a board of supervisors to contract with a hospital for the care of indigent persons in emergency cases to "hospitals in the county or city and county" of which the board has jurisdiction. The board of supervisors of San Joaquin County authorized the sending of a patient in an emergency case to the University of California Hospital in another county. Said hospital performed an operation on the patient at the request of the board of supervisors of San Joaquin County and filed a claim for \$110.95 for this service. The auditor of this county refused to pay this claim on the ground that it was an illegal claim not authorized by law. A writ of mandamus was issued directing him to draw his warrant in payment of the claim. From this order he appealed. The court said:

"We are of the opinion the board of supervisors of the County of San Joaquin is not authorized by law to incur an obligation against the county for hospital or surgical service on behalf of an indigent person who resides in that county, to be furnished by a hospital out-

side of the county. *The Regents of the University of California v. F. H. Johnson*, 2 Cal. App. 2nd 203 (1934).

After quoting the statute in question the court further said:

"The foregoing statute is an express limitation on the power of the board to contract for the medical care of its indigent sick persons with 'hospitals in the county.' The statute specifically prohibits the board from 'letting the care, maintenance or attendance of such indigent sick,' by contract to any institution 'except * * * hospitals in the county.' Even without the express prohibition against contracts for the care of the indigent sick with other institutions, on the doctrine of *expressio unius est exclusio alterius*, the authorization for the board to make such contracts with hospitals in the county, by necessary implication excludes the right to make contracts with hospitals outside of the county." (Citing authorities.)

While it may be true as Mr. Kepecs suggests that it would be better for the moral and physical well being of pauper children to place them in homes removed from the city's congested area, the plainly worded provisions of section 21 prohibit such practice.

Opinion No. 10071 of August 7, 1939 to the Commissioner of Relief holds substantially the same opinion.

LEVYING TAX FOR VETERANS' RELIEF

(No. 9891—A. F. G.—September 22, 1938—5½ pp.)

The City has no power to levy a tax for the relief of indigent and suffering veterans under the Bogardus act which regulates the granting of relief to indigent war veterans.

Citations:

Statutes: IRS '37, 107: 14a, 17a, 24: 65.102, 123, 23: 154a, 154i (Bogardus act, secs. 2, 10).

Cases: *Robbins v. Kadyk*, 312 Ill. 290 (1924).

People ex rel. Cannon v. Chicago, 351 Ill. 396 (1933).

People v. Wabash Ry., 349 Ill. 93 (1932).

Other reference: Op. Ill. Atty. Gen., March 25, 1937 (Executive Secretary of the Illinois Emergency Relief Commission).

OPINION OF FOREGOING SYNOPSIS

Referring to your letter of September 10, 1938, re: relief for indigent veterans, you state that you have received our communication relative to this matter. We assume that the communication referred to is our letter to Leo M. Lyons, Commissioner of Relief dated July 23, 1938.

In the first sentence of the first paragraph of your letter you say:

"I have received your communication relative to the above matter, and referring to paragraph 3, I cannot agree to any of the language therein contained as applying to the indigent veterans."

Further on in the same paragraph you make this statement:

"* * * The new point of the Corporation Counsel as expressed in these paragraphs is not a correct legal expression supported by the law and the facts and is not acceptable to us and we hereby serve notice on the corporation counsel that this question be further considered by him, and a corrected opinion issued, it appearing to us that yours is a gross legal misconception of our rights under the Bogardus Act and those adjudicated thus far by the Court."

The third paragraph of our letter to which you thus take exception is as follows:

"It is your duty under the Pauper Act to relieve all poor and indigent persons lawfully resident in Chicago. The taxes levied and monies appropriated under that Act are placed in a special fund and can only be used for that purpose. The City of Chicago has no authority to levy a separate tax for the relief of indigent soldiers and sailors as such. The maximum which the city may levy for relief purposes is 3 mills on the hundred dollars of valuation, which maximum has been levied for the year 1938."

Permit us to analyze this paragraph to see if what is expressed there "is not a correct legal expression supported by the law."

The paragraph consists of four sentences which we will discuss separately giving our authority for each statement. The first sentence is:

"It is your duty under the Pauper Act to relieve all poor and indigent persons lawfully resident in Chicago."

Chapter 107, Sections 14a and 17a, Ill. Rev. Stats. 1937;
Chapter 24, Article V, Paragraph 102a, Ill. Rev. Stats. 1937;
Sections 609a and 609d, Revised Chicago Code 1931 (Coun. J. July 1, 1936, p. 1958).

The second sentence is as follows:

"The taxes levied and monies appropriated under that Act are placed in a special fund and can only be used for that purpose."

Chapter 24, Article VIII, Section 1—Ill. Rev. Stats. 1937.

The third sentence is:

"The City of Chicago has no authority to levy a separate tax for the relief of indigent soldiers and sailors as such."

A municipal corporation has no power to levy any tax except such as is specifically granted to it by the legislature. *Robbins v. Kadyk*, 312 Ill. 290 (1924). The General Assembly has power to impose taxes on municipal corporations for purposes not local in character but to obtain the performance of duties which promote the general welfare and security of the State. *People ex rel. Cannon v. Chicago*, 351 Ill. 396 (1933). Under this power the legislature has imposed on the City of Chicago the duty of supporting all poor and indigent persons resident therein. Under this power the legislature could have imposed on the city of Chicago the obligation of caring for the needy veterans of the several American wars. Has it done so?

When the General Assembly imposed the duty on the city of Chicago of providing for its needy people it found it necessary to amend several statutes. It provided in Section 14a of the Pauper Act that cities of over 500,000 population should relieve poor and indigent persons lawfully resident therein. It amended Article V of the Cities and Villages Act by including in the enumerated powers of the City Council the power to relieve and support poor and indigent persons lawfully resident therein. It amended Articles 7 and 8 of the same act which respectively are the appropriation and tax levying provisions of the act. Article 7 was amended to permit appropriations to be made after the first quarter of the year in 1936 and the amendment to Article 8 authorized the city to levy a tax of 3 mills on the dollar of valuation for the relief and support of poor and indigent persons.

Before and since the legislature made these changes in the law concerning pauper relief the duty of providing for indigent and suffering veterans and their families under the Bogardus Act was in the overseer of the poor in towns and in the county boards in counties. (Sec. 2.)

The last paragraph of Section 10 of the Bogardus Act is in part as follows:

"In all counties having a population of 500,000 or more, where such Veterans Relief Commission is organized, there shall be appropriated, in addition to the amount appropriated each year for relief purposes under this Act, by the counties, such additional sums of money, upon the recommendation of the Veterans Relief Commission, as may be deemed necessary by such county board to properly compensate the officers and employees required to administer such relief. * * *"

When the General Assembly in 1936 transferred the duty of caring for paupers from the County of Cook to the city of Chicago it had before it the Bogardus Act. If it were the intention of the legislature to transfer from the county to the city the obligation of relief to veterans it would have accordingly amended the Bogardus Act and the Cities and Villages Act to that end. Not having done so can we impute to the legislature an intention which it so easily could have expressed?

We are of the opinion that the city of Chicago has no power to levy a tax for the relief of indigent and suffering veterans under the Bogardus Act. This also is the view of the Attorney General of Illinois who, in an opinion dated March 25, 1937, to the Executive Secretary of the Illinois Emergency Relief Commission, said:

"It being invalid in my opinion for local governmental units to make a separate levy for the care and support of poor and indigent war veterans in addition to the three mill or 30¢ levy being made for the care of all other poor and indigent persons, it becomes unnecessary to deal with your question relative to monthly estimates of relief requirements, etc., relative to indigent war veterans and their families."

In the *People v. Wabash Railway Company*, 349 Ill. 93 (1932) our Supreme Court said:

"The rule accepted by all authorities is that the language of an act granting the authority to tax shall be strictly construed. The reasonable presumption is that the state has granted in clear and unmistakable terms all it intends to grant, and the municipal authorities who assume to exercise the power to tax must be able to show their warrant for the exercise in the words of the act granting the power." Citing *People v. Public Service Co.*, 328 Ill. 440 (1928); *Town of Drummond v. Cox*, 165 Ill. 648 (1897); *Drake v. Phillips*, 40 Ill. 388 (1866).

The fourth sentence in the paragraph which you find objectionable is

"The maximum which the city may levy for relief purposes is 3 mills on the hundred dollars of valuation, which maximum has been levied for the year 1938."

This refers to the special tax for relief and should read "3 mills on the dollars of valuation" and the authority for the statement is found in section 1 of Article VIII, Cities and Villages Act.

From the foregoing it will be seen that we cannot change the opinion expressed in the paragraph referred to without doing violence to the statutory authority on which the paragraph is based.

CHAPTER IX

PUBLIC WAYS

A. DEDICATION AND VACATION

PUBLIC HIGHWAY BY PRESCRIPTION

(No. 9855—*Commissioner of Public Works—A. A. S.—June 30, 1938—*
2 pp.)

A road which has been used continuously by the public as a highway for more than fifteen years is by statute a public highway.

Citations:

Statute: IRS '37, 121: 152.

Case: Mudge v. Wagoner, 320 Ill. 357 (1926).

CITY'S RIGHTS IN BIRCHWOOD AVENUE

(No. 10137—*Alderman of 49th Ward—D. L. L.—November 16, 1939—*
5 pp.)

By virtue of the statutory dedication of Birchwood avenue as a street, in 1890, the City acquired the fee and all riparian rights including all accretions of land, either by natural or artificial means, which extended the street line into the lake. Thus Birchwood avenue as it now exists from Sheridan road east to the shore line of Lake Michigan belongs to the City and the City has the right to pave that street and exercise all its powers over public streets over Birchwood avenue.

Citations:

Statutes: IRS '39, 109: 3, 121: 152.

Cases: Kennedy v. Town of Normal, 359 Ill. 306 (1934).

Heppes v. City of Chicago, 260 Ill. 506 (1913).

Sears v. City of Chicago, 247 Ill. 204 (1910).

McCormick v. Chicago Yacht Club, 331 Ill. 521 (1928).

Miller v. Commissioners of Lincoln Park, 278 Ill. 404 (1917).

Brundage v. Knox, 279 Ill. 450 (1917).

Illinois Central RR. Co. v. Illinois, 146 US 387 (1892).

Bliss v. Ward, 198 Ill. 104 (1902).

OPINION OF FOREGOING SYNOPSIS

We have your letter of October 27, 1939, requesting our opinion as to the ownership of the street at the east end of Birchwood Avenue adjacent to Lake Michigan. You state in your letter that a question has arisen concerning the title to this street because the Works Progress Administration refused to authorize the paving of Birchwood Avenue from Eastlake Terrace to Lake Michigan contending that section of the street does not appear of record as a continuation of Birchwood Avenue and they were in doubt as to the title of the city to the street in question.

Pursuant to your request, we caused a survey to be made by Ralph G. Storey, Junior Engineer of the Board of Local Improvements, of Birchwood Avenue from N. Eastlake Terrace to Lake Michigan. A copy of that survey is attached hereto. The survey indicates that the shore line of Lake Michigan, when this property was subdivided and Birchwood Avenue was dedicated as a street, was about 75 to 100 feet west of where the shore line is now located as of November 2, 1939, the date the survey was made.

Birchwood Avenue was dedicated to the City of Chicago on April 27, 1890, when a plat showing such dedication was filed of record with the Recorder of Deeds of Cook County as document No. 1326212. This dedication was accepted by the city and the title to Birchwood Avenue to the shore line of 1890 was vested in the City of Chicago. (Ill. Rev. Stat. 1939, Ch. 109, Par. 3.) *Kennedy v. Town of Normal*, 359 Ill. 306 (1934); *Heppes v. City of Chicago*, 260 Ill. 506 (1913); *Sears v. City of Chicago*, 247 Ill. 204 (1910).

It is well settled that the ownership of the bed of Lake Michigan is vested in the State in trust for the public. *McCormick v. Chicago Yacht Club*, 331 Ill. 521 (1928); *Miller v. Commissioners of Lincoln Park*, 278 Ill. 404 (1917). While title to the bed is in the State, the riparian rights of an owner of land adjoining the waters of Lake Michigan include the right of accretion and the right of access to the water from the land. *Miller v. Commissioners of Lincoln Park*, *supra*.

The general rule is that the accretion from a navigable stream to land adjoining it becomes corporate with it and title is vested in the accretions in the original owner of the land; it is also held that when the accretion is caused by artificial means, with the assent of the State, the rule is the same. It has been held that the owner of land bordering on Lake Michigan has title to land formed adjacent to his property by accretions, even though the formation of such accretions is brought about by artificial conditions created by third parties. *Brundage v. Knox*, 279 Ill. 450 (1917).

In *Illinois Central Railroad Company v. Illinois*, 146 U. S. 387 (1892) the State of Illinois claimed title to submerged lands lying east of the right of way of the Illinois Central Railroad Company. The City of Chicago claimed the ownership in fee of the grounds on the east front of the city bordering on the lake and all riparian rights attached to such ownership. The court in that case held that the fee in the lands dedicated to public use on the lake front by plat passed to the City of Chicago and that the fee of the land made and reclaimed by filling in from the shore line was in the city and that the city had the rights of a riparian owner. *Bliss v. Ward*, 198 Ill. 104 (1902).

The City of Chicago by virtue of the statutory dedication of Birchwood Avenue as a street in 1890 acquired the fee in the lands so dedicated for that purpose and by virtue of such title acquired all riparian rights, and the accretions of land either by natural or artificial means which extended the street line further out into the lake, did not change the ownership and the rights of the City of Chicago in the addition to Birchwood Avenue. The City of Chicago acquired through its riparian rights the ownership of the land between the shore line as it then existed in 1890 and the shore line as it now exists.

It is our opinion that the city is the owner of that portion of the street in controversy by virtue of the original dedication of Birchwood Avenue. Assuming that the City of Chicago did not have title in Birchwood Avenue by virtue of the dedication, the property in question and the rest of the street would still, according to information furnished us, have become vested in the City of Chicago by prescriptive use for a period of years extending well beyond the statutory period for the acquisition of streets as provided for by statute. (Ill. Rev. Stat. 1939, Ch. 121, Par. 152.)

It is our conclusion, therefore, that Birchwood Avenue as it now exists from Sheridan Road east to the shore line of Lake Michigan belongs to the City of Chicago and that the City of Chicago has the right to pave that street and to exercise over it all of its powers over public streets and highways and that it will not be necessary to acquire any further portion of Birchwood Avenue adjoining the lake, either by dedication or any other legal means.

DEDICATION OF COUNTY PROPERTY—STATE HIGHWAYS

(No. 9896—*Commissioner of Public Works—W. V. S.—October 4, 1938*
—2½ pp.)

The County has power to dedicate land owned by it for a public street. A certificate of survey upon the plat of dedication executed by the County Superintendent of Highways is insufficient. The certification must be made by a competent surveyor.

The designation of streets within the City as State highway extensions is accomplished by the State Department of Public Works and Buildings, and no action is required by the City.

Citations:

Statutes: IRS '37, 109: 1, 2, 121: 296a to 296e.

Case: Village of Auburn v. Goodwin, 128 Ill. 57 (1889).

Other reference: Elliott, *Roads and Streets* (4th ed.), v. 1, sec. 160.

CONTINGENT VACATION OF PUBLIC WAY

(No. 9953—*Commissioner of Public Works—W. V. S.—February 2, 1939—2 pp.*)

No valid provision can be framed which will make the vacation of a public street or alley contingent upon the use to which the land which formed the street or alley is put after the vacation.

Citations:

Cases: Cicero Lumber Co. v. Town of Cicero, 176 Ill. 9 (1898).

People v. Benson, 294 Ill. 236 (1920).

Other reference: Op. Corp. Coun. (No. 9899), this volume, p. 212.

Opinion No. 9899 of October 20, 1938 to the Commissioner of Public Works holds substantially the same as the above opinion.

VACATION OF PART OF PUBLIC ALLEYS

(No. 10042—*Commissioner of Public Works—E. H.—June 27, 1939—2 pp.*)

Where the beneficiaries of an ordinance vacating an alley are the owners of all of the property adjoining the alley to be vacated, there will be no liability on the part of the City for damages because of such vacation.

Where only a part of an alley is to be vacated so that ingress and egress will be affected, the City may be subject to liability for damages by the owner of property adjoining the part or the alley not to be vacated unless the owner consents to such vacation.

VACATION OF LAND WITH DELINQUENT SPECIAL ASSESSMENTS

(No. 9760—*Commissioner of Public Works—A. A. S.—January 20, 1938—1½ pp.*)

An ordinance for the vacation of streets and alleys should not be presented to the City Council so long as there are any unpaid special assessments, both delinquent and current, against portions of the land to be vacated. By statute, the plat of the land to be vacated must be endorsed by the County Clerk as having no delinquent general taxes, unpaid current general taxes, delinquent special assessments, and unpaid current special assessments against any portion of the land.

CHANGE OF STREET NAME

(No. 9771—*Secretary, Committee on Local Industries, Streets and Alleys—A. F. G.—February 11, 1938—3½ pp.*)

A petition to change the name of a street must be signed by the owners of at least sixty per cent of the property along the entire length of the street, and not along merely that portion of the street for which a new name is desired. The new name selected must be given to the entire length of the street.

Citations:

Statute: Cities and Villages act, art. V, sec. 23.

Ordinance: Coun. J. (1936-37), p. 1990.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge your letter of September 23, 1937 asking our interpretation of an Act of the last General Assembly in relation to the power of the City Council in the matter of changing street names.

You state that a petition has been filed with the City Council purporting to bear the signatures of the owners of more than sixty per cent of the property abutting that part of N. Bernard street which was formerly named Smalley court, and requesting that the name of that portion of N. Bernard street be changed back to Smalley court.

That portion of N. Bernard street which was formerly Smalley court is two blocks in length while Bernard street is more than three miles in length. Both are on the same north and south line.

You ask the specific question:

"Under the law in question, can the name of that portion of N.

Bernard street which was formerly Smalley court be changed without the written consent of the owners of at least sixty per cent of the property abutting the entire length of said N. Bernard street, or is it sufficient to have only the written consent of the owners of at least sixty per cent of the property abutting the portion of the street for which a new name is requested? Does 'street' as used in said amendment mean the entire length of a street, or only that portion of a street for which a new name is desired?"

The Act in question amends section 23 of article V of the Cities and Villages Act and reads as follows:

ARTICLE V.

"Sec. 23. To name and change the name of any street, avenue, alley or other public place, *provided no change of name shall be made unless a proposition for such change has first received the written consent of the owners of at least sixty per cent (60%) of the property abutting thereon; And, provided further, that the city council or board of trustees, as the case may be, shall change the name of any street, avenue, alley or public place upon a petition signed by the owners of at least sixty per cent (60%) of the property abutting thereon, setting forth the name desired; but said city council or board of trustees shall not assign to such street, avenue, alley or public place the same name as is used to designate any other street, avenue, alley or public place.*"

When the City Council changed the name of Smalley court to N. Bernard street, July 1, 1936, Coun. J. p. 1990, that street officially ceased to exist and the maps and plats of City streets were changed in accordance with the ordinance.

The statute contemplates changes in the names of existing streets. The first proviso prohibits the City Council from changing the name of any street unless a proposition for such change has received the written consent of the owners of at least sixty per cent of the property abutting thereon. The second proviso makes it compulsory upon the City Council to change the name of a street when a petition signed by the owners of at least sixty per cent of the property abutting thereon, setting forth the name desired, has been presented to that body.

We do not believe the statute authorizes the City Council to change the name of part of a street.

In the instant case, if a petition signed by the owners of at least sixty per cent of the property abutting N. Bernard street had been presented to the Council requesting that the name of that portion of that street formerly Smalley court be changed to Smalley court we do not believe the Council would have power to make such change. The new name would in our opinion be required to be given to the street now known as N. Bernard street.

Any other construction would lead to endless confusion. The purpose of the City Council in recently making wholesale changes in street names was twofold; (1) to abolish duplicate street names, and (2) to give to streets which were continuations of other streets, or which if they were not continuations were in direct line with other streets, the same name. The petition now before your body if complied with would frustrate that policy.

We are therefore of the opinion that under the law as amended a petition to change the name of a street must be signed by the owners of at least sixty per cent of the property abutting thereon, and the new name selected must be given to the entire length of the street. We are also of the opinion that the word "street" as used in said amendment means the entire length of a street and not only a portion of a street for which a new

HOUSE NUMBER CERTIFICATE FOR BUILDING ON STREET

(No. 10081—*Commissioner of Public Works—H. R. P.—August 17, 1939—2 pp.*)

The erection of a contemplated building which would fall within a street which had been established as a public highway in 1857, would constitute an encroachment upon the City's rights in the street, and until competent legal authority declares said street to have been abandoned or vacated, no house number certificate for such house should be issued.

Citations: *Rodgers v. Hess*, 325 Ill. 603 (1927).
Hanser v. Green, 275 Ill. 221 (1916).
Champlin v. Morgan, 20 Ill. 181 (1858).

B. USE OF STREETS, ALLEYS AND SIDEWALKS**SALE OF POLITICAL PAMPHLETS ON STREETS**

(No. 9882—*Commissioner of Police—B. H.—September 12, 1938—4 pp.*)

The prohibition of the sale of a political pamphlet upon the streets, alleys, and other public places of the City in certain congested areas does not violate "the constitutional right of a political party to freedom of expression." A political party has no greater right to sell upon the public streets than has any other person or organization. The ordinance in question has been judicially determined to be a proper and reasonable exercise of the police power, and in its impartial enforcement there is no deprivation of constitutional rights.

Citations:

Ordinance: Code '31: 974.

Cases: *Chicago v. Rhine*, 363 Ill. 619, 2 NE (2d) 905, 105 ALR 1045 (1936).

People v. Thompson, 341 Ill. 166 (1930).

Commonwealth v. Ellis, 158 Mass. 555, 33 NE 651 (1893).

OPINION OF FOREGOING SYNOPSIS

Your letter of August 4, 1938 quoted from a letter received by you from an organizer of the Socialist Labor Party of America concerning interference by the Police Department with the sale of a pamphlet entitled "John L. Lewis Exposed" on the corner of Michigan avenue and Randolph street. The letter addressed to you takes the position that the action of police officers in threatening arrest unless the sale of the pamphlet was discontinued violates "the constitutional right of a political party to freedom of expression." You requested our opinion as to the course to be followed by the Police Department "relative to the selling on the streets of this or similar pamphlets."

Your request involves primarily a consideration of the power of the City to prohibit sales upon its streets and sidewalks. Sales upon the streets in certain areas in the City have been prohibited by Section 974 of the Revised Chicago Code of 1931, as amended, which provides:

"974. Sale of everything but newspapers prohibited within defined areas.) It shall be unlawful for any person, firm or corporation to sell, offer or expose for sale, or solicit any other person to purchase, any article whatsoever, except daily newspapers, on any street, alley or other public place in the City of Chicago within the district bounded on the north by the Chicago river, on the south by the south line of Roosevelt road, on the east by Lake Michigan, and on the west by the Chicago River or within the district bounded on the north by the north line of N. Argyle street, on the south by the south line of W. Montrose avenue, on the east by Lake Michigan and on the west by the center of N. Clark street; provided, that the Mayor may in his discretion authorize the Commissioner of Compensation to issue temporary permits to street venders authorizing them to sell toys and novelties within the said districts between the fifteenth day of December and the twenty-fifth day of December of each year."

The validity of this ordinance was sustained in the case of *City of Chicago v. Rhine*, 363 Ill. 619, 2 N. E. (2d) 905, 105 A. L. R. 1045 (1936), against an attack upon constitutional grounds by one who had been arrested for offering magazines for sale within the Loop district. The decision was based upon the ground that the City has the right to regulate sales upon streets and sidewalks and in public places, and, as the court said, "the right to regulate sales upon streets, sidewalks and public places *ipso facto* carries with it the authority not only to impose reasonable restrictions and regulations but even to suppress sales thereon."

A similar attitude toward the use of the public streets for business purposes was expressed in *People v. Thompson*, 341 Ill. 166 (1930), where the court said: "No one has any inherent right to use the streets or highways as a place of business." And in *Commonwealth v. Ellis*, 158 Mass. 555, 33 N. E. 651 (1893), Mr. Justice Holmes said:

"Any one who has observed the obstruction to travel and general inconvenience which are caused by a stationary object in our crowded and narrow streets would be slow to declare unreasonable a prohibition intended to prevent that inconvenience. We are of opinion, on both principle and authority, that for this purpose the city council lawfully may forbid public selling in the streets."

What has been said would be sufficient to dispose of the particular incident to which you called our attention. However, because your request for our opinion is not confined to this particular incident, but deals with the course to be pursued by your department generally in the enforcement of this ordinance, and because the pamphlet in question is of a political nature and the suggestion has been made that to prevent its sale is to violate rights guaranteed by the Constitution, further discussion is warranted.

In the administration of this ordinance, your department is no more concerned with the economic or political views expressed in a publication offered for sale upon the streets than with the value or usefulness of any other article offered for sale upon the streets. This pamphlet, for example, attacks a present day labor leader upon the ground that his policies are too conservative. It is a matter of common knowledge that other publications attack the same labor leader upon the ground that his policies are too radical, while still other publications support and advocate his policies. With the merits of this or any other political or economic controversy your department is not concerned. The prohibition of the ordinance is not based upon the nature of the commodity sold in the re-

stricted areas; nor, as applied specifically to books and magazines, is the ordinance concerned with the views expressed or the policies advocated. Discrimination in favor of publications advocating certain political theories and policies and against those advocating opposing theories and policies would certainly render the ordinance invalid.

Discrimination prohibited in legislation may not, of course, be made effective in administration; the ordinance in question is equally applicable to sales of all publications other than daily newspapers upon the streets within the restricted areas. No discretion is given to the Police Department in the enforcement of this ordinance.

The suggestion that enforcement of the ordinance violates "the constitutional right of a political party to freedom of expression," is unsound. A political party has no greater right to sell upon the public streets than has any other person or organization. It is, together with all other persons and organizations, subject to the authority of the State in the exercise of the police power to enact reasonable laws designed to promote the health, safety, morals and general welfare of the people. The ordinance in question has been judicially determined to be a proper and reasonable exercise of the police power and it follows that in its impartial enforcement there is no deprivation of constitutional rights.

SALE OF NEWSPAPERS ON PUBLIC WAYS

(No. 9880—*Commissioner of Police—B. H.—August 31, 1938—2 pp.*)

The sale of a publication which is a daily newspaper upon the streets, alleys or other public places of the City does not violate the provision of the City code which prohibits the sale of everything but newspapers in certain defined areas.

Citations:

Ordinance: Code '31: 974.

Cases: Chicago v. Rhine, 363 Ill. 619, 2 NE (2d) 905, 105 ALR 1045 (1936).

Near v. Minnesota, 283 US 697, 75 (L. Ed.) 1357, 1371 (1930).

PRISMATIC GLASS ON SIDEWALK

(No. 10094—*Acting Commissioner of Streets and Electricity—M. H. F.—September 6, 1939—3½ pp.*)

The use of an eight inch prismatic glass as part of the top or wearing surface of any sidewalk is expressly prohibited by ordinance, regardless of whether it is used for floodlighting purposes or otherwise.

Citation: Code '31: 842 (H).

PRIVATE PROPERTY USED AS SIDEWALK

(No. 9867—*Chairman, Committee on Finance—E. H. H.—August 2, 1938—3 pp.*)

The City is not liable for the public's use of private property for sidewalk purposes.

SELLING FLOWERS UPON PARKING LOT IN THE "LOOP"

(No. 10001—*Commissioner of Police—M. H. F.—May 10, 1939—2 pp.*)

The operation of a florist's stand on the lot line of private property abutting on the public way within the "Loop" district and selling to purchasers while they are standing upon the public sidewalk, amounts to transacting business on the public way, subject to the ordinance prohibiting sales of anything but newspapers on the public way in the "Loop."

Citations: Code '31: 974, 3573 to 3586.

CHECK CASHING BUSINESS ON STREETS

(No. 9935—*Commissioner of Police—M. H. F.—December 24, 1938—2 pp.*)

The City has the power to regulate or even to prohibit the use of streets for the business of cashing checks from armored cars, as this is a special or extraordinary use of the streets for private gains.

Citation: *People ex rel. Johns v. Thompson*, 341 Ill. 166 (1931).

**USE OF STREETS AND SIDEWALKS FOR THE SALE OF
SECOND-HAND AUTOMOBILES**

(No. 9743—*C. N.—January 4, 1938—1½ pp.*)

Dealers in second-hand cars have no right to obstruct the streets and sidewalks outside of their premises with their merchandise. The streets and sidewalks are intended for the use of all the people, and the City may and has the duty to prevent their use for private purposes.

REMOVAL OF HOUSEHOLD GOODS ON SIDEWALK

(No. 9986—*Alderman, 45th Ward—E. J. B.—April 14, 1939—5 pp.*)

While the Department of Police and the Department of Public Works have the right to remove unlawful obstructions from the streets, the City should not willingly accept the burden and expense of the removal and disposition of household effects which have been

wrongfully placed in the street by the bailiff under eviction writs and allowed to remain there by the owners. The owners should be requested to remove their property.

Should it be necessary for the City departments to remove such household effects, an itemized inventory should be made of all articles, showing the condition and probable value of each article at the time of removal, and when such property is sold after advertisement, the law should be strictly complied with.

Citations:

Statutes: Cities and Villages act, art. V, secs. 9, 10, 14.

Ordinances: Code '31: 900, 972, 975, 976, as amended.

Other references: Op. Corp. Coun. (1915-16), p. 96, v. 19, p. 242.

BRICKS OBSTRUCTING SIDEWALK

(No. 9857—Alderman, 21st Ward—L. V. R.—July 1, 1938—2½ pp.)

A brick company may not pile bricks in front of its place of business except in conformity with the City code pertaining to the receiving, delivering and storing of property on streets and sidewalks. Where such an obstruction of the sidewalk exists, the City through its proper officers has the right to order the removal of it, and upon refusal or failure, to proceed to enforce these sections.

Citations:

Ordinances: Code '31: 971, 972, 3637, 3639.

Case: Tolman and Company v. Chicago, 240 Ill. 268 (1909).

BRIDGE CLOSED FOR RECONSTRUCTION

(No. 9774—Commissioner of Public Works—A. A. S.—February 14, 1938—4½ pp.)

The closing of a bridge, which is being reconstructed, for a period of 3 or 4 months is within the right of the City, and there is no obligation upon the City to provide a temporary crossing of the river for street cars. The City will not be liable for closing the bridge to traffic.

Citations:

Statute: Cities and Villages act, art. V, sec. 28.

Cases: Middlesex RR. v. Wakefield, 103 Mass. 261 (1869).

International Ry. v. Witherspoon, 152 NYS 971 (1915).

FENCING OF PARKWAYS

(No. 9861—Chairman, Committee on Finance—C. N.—July 19, 1938—1½ pp.)

While the fencing of parkways is frequently resorted to by owners of property, all legal rights to the parkway are in the municipality.

No duty devolves upon the City to construct such fences or provide for the maintenance of those constructed by property owners.

The City may order the removal of a parkway fence which is a dangerous obstruction because of its deteriorated condition.

GOSPEL SERVICES IN THE STREETS

(No. 9838—*Commissioner of Police—C. P. H.—June 3, 1938—1½ pp.*)

Gospel services which are amplified and broadcast through a loud speaker attached to a motor truck may not be held at various street intersections unless a permit has been obtained from the Police Department. All open-air public meetings, regardless of their nature, are prohibited without a permit.

Citation: Code '31: 979.

PEDDLER CALLING HIS WARES

(No. 10100—*C. N.—September 16, 1939—2 pp.*)

A vendor cannot call his wares upon a public street or in such close proximity to a public street as to be distinctly and loudly audible, but he may call his wares in a public alley after 11:00 A. M. and until 6:00 P. M.

Citation: Code '31: 3573, 4194.

C. ADVERTISING AND HANDBILLS

HANDBILLS DISTRIBUTED FOR ADVERTISING PURPOSES

(No. 9885—*Commissioner of Police—B. H.—September 14, 1938—5½ pp.*)

If a handbill constitutes advertising matter, its size and the manner of its distribution on the streets and sidewalks of the City must conform to the City's ordinance regulating the distribution of advertising matter, but if the only purpose of the handbill is to present political, economic, and social views and arguments, its distribution does not come within the City's ordinances.

Citations:

Ordinance: Code '31: 4281.

Cases: Lovell v. City of Griffin, 303 US 444, 82 (L. ed.) 660 (1938).
Chicago v. Schultz, 341 Ill. 208 (1930).

Other references: ALR 22: 1494, 114: 1446.

OPINION OF FOREGOING SYNOPSIS

You have requested our opinion as to the course to be pursued by the Police Department in connection with the distribution upon the streets of handbills, leaflets and circulars dealing with social, economic and political questions. Other communications dealing with the same question, addressed to the Mayor and other City officials, have been referred to this Department.

The communications which have been received by this Department make it apparent that confusion exists both as to the effect of the decision of the Supreme Court of the United States in the recent handbill case [*Lovell v. City of Griffin*, 303 U. S. 444, 82 L. Ed. 660 (1938)], and as to the scope of the ordinance of the City of Chicago relating to the distribution of handbills upon the streets. In the *Lovell* case, the Supreme Court declared invalid an ordinance of the City of Griffin, Georgia, which prohibited the distribution of handbills unless a permit for distribution had first been obtained from the City Manager. The ordinance might have been held invalid upon the ground that it delegated legislative power to an administrative official and yet failed completely to fix standards in accordance with which his action should be taken; under the ordinance, the decision as to whether or not a particular handbill might be distributed, was left to the uncontrolled discretion of the City Manager. The Supreme Court, however, based its decision upon the broader ground that the ordinance interfered with the right of freedom of the press which is secured against invasion by the states or their subdivisions by the Fourteenth Amendment to the Constitution of the United States.

If, prior to the decision in the *Lovell* case, it had been doubted that the constitutional protection extended to publications other than books, periodicals and newspapers, those doubts have been dispelled. Analyzing the historical basis of the constitutional provision, the court said:

"The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. * * *" (82 L. Ed. 663.)

The decision in the *Lovell* case does not, however, as is apparently supposed, imply that all ordinances restricting or regulating the distribution of handbills are invalid. This was made clear by Chief Justice Hughes, when, describing the ordinance before the court in the *Lovell* case, he said:

* * * "There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets. The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager." (82 L. Ed. 662.)

In *City of Chicago v. Schultz*, 341 Ill. 208 (1930), an ordinance of the City of Chicago which made it unlawful to distribute any circulars or handbills upon any street, alley, sidewalk or other public place, was held invalid as an unreasonable exercise of the police power of the City.

From these decisions it is apparent that an ordinance which prohibits the distribution of handbills absolutely and under all circumstances is invalid. And it is also apparent that any restriction upon the right to publish and distribute handbills presenting political, economic or social views and arguments strikes dangerously close to fundamental rights guar-

anted by the Constitution. The necessity for any such restriction, as tending to promote the public health, safety, morals or general welfare, must be clearly apparent in order that the restriction may be sustained.

Not all regulations concerning the distribution of handbills, however, are vulnerable to constitutional attack. Ordinances restricting and regulating the distribution of handbills upon public streets because of the tendency of such distribution to endanger the public health and safety and to create fire hazards by littering the streets, have frequently been sustained. Cases involving ordinances of this type are collected in annotations in 22 A. L. R. 1494 and in 114 A. L. R. 1446. Detailed analysis of each of these decisions is unnecessary. It is sufficient to say that ordinances regulating the distribution of handbills have been sustained where it was made to appear that unregulated distribution impaired the public health, safety or general welfare.

The ordinance of the City of Chicago which concerns the distribution of handbills and pamphlets is Section 4281 of the Revised Chicago Code of 1931 as amended. It provides:

"4281. *Distribution of advertising matter.*) It shall be unlawful for any person to distribute advertising matter of any kind on any public street of the City otherwise than from hand to hand without tossing or throwing; and it shall be unlawful for any person to distribute, hand out, or scatter on any public street or sidewalk any handbills or dodgers of a size four and one-half inches by six inches or larger, or any other loose sheets of advertising matter which would litter the street or sidewalk if allowed to drop thereon; provided, that such handbills, dodgers or loose sheets, if enclosed in envelopes or folded or otherwise handed out in such a manner as to avoid the likelihood of falling while being passed out, may be distributed from hand to hand if not tossed or thrown. Any person distributing advertising matter on a public street which is different from that permitted under the provisions of this section, or in a manner contrary to the methods prescribed herein, or in such a manner that the public street becomes littered by its distribution, shall, upon conviction thereof, be fined not less than five dollars nor more than fifty dollars for each offense."

It is clear that this ordinance seeks to prevent the dangers and inconveniences resulting from littering of streets by promiscuous distribution of advertising matter. To this end it regulates the size of handbills and the manner of their distribution. It is also clear that the ordinance deals only with the distribution of advertising matter and does not affect at all the distribution of handbills or dodgers unless they constitute advertising matter.

In the enforcement of this ordinance, the first question to be determined by your Department is whether or not the handbill in question constitutes advertising matter; if this question is answered in the negative, distribution of the handbill is not affected by the ordinance. As we have stated, the ordinance deals only with the distribution of advertising matter, and handbills whose only purpose is to present political, economic and social views and arguments do not fall within its scope. If the handbill constitutes advertising matter, however, then its size and the manner of its distribution must be in accordance with the provisions of the ordinance.

DISTRIBUTION OF HANDBILLS

(No. 9879—B. H.—August 27, 1938—2½ pp.)

An ordinance which flatly prohibits the distribution of handbills, circulars and the like is of very doubtful validity. The power of mu-

nicipalities to prevent the littering of streets by promiscuous distribution of advertising matter has, however, been sustained by the courts.

Citations:

Ordinances: Code '31: 1007, 4281.

Cases: Chicago v. Schultz, 341 Ill. 208 (1930).

Lovell v. City of Griffin, 56 S. Ct. 666, 8 (L ed.) 660 (1938).

Other references: ALR 22: 1484; 114: 1446.

EMPLOYMENT OF MINORS TO DISTRIBUTE HANDBILLS

(No. 9757—*C. N.*—January 17, 1938—1½ pp.)

Minors under the age of fourteen by State law, may not be employed to distribute handbills after school hours. In the case of minors over 14 years of age, permission must be obtained from the Board of Education, and the minor must be accompanied by a parent when applying for such permission.

ADVERTISING SIGNS RESEMBLING TRAFFIC LIGHTS

(No. 10144—*Subcommittee on Safety and Lighting—A. F. G.*—November 21, 1939—2 pp.)

The City ordinances prohibit any person from maintaining any device which resembles an official traffic signal and which interferes with the effectiveness of such official traffic signal. This provision prohibits the erection of a red, green or amber lighted advertising sign which might be mistaken for a traffic signal.

Citation: Mun. Code: 27-11.

D. TRAFFIC

REGULATION OF SPEED BY CITY

(No. 10160—*Committee on Safety and Lighting—A. F. G.*—December 18, 1939—4½ pp.)

The provision in the Motor Vehicle act prohibiting cities from limiting the speed of motor vehicles does not conflict with the provision in the State Uniform Traffic act authorizing cities to determine the rates of speed the exceeding of which shall be "prima facie evi-

dence" of reckless driving. The latter provision merely establishes a rule of evidence and does not determine the offense.

Citations:

Statutes: Motor Vehicle law, sec. 26.

Uniform Act Regulating Traffic on Highways, secs. 49a, 50.

Case: Meadowcraft v. People, 163 Ill. 56 (1896).

Other reference: 3 Words and Phrases (2nd Ser.) 1175.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your letter of December 11, 1939 which is as follows:

"At a meeting held this date, the Subcommittee on Safety and Lighting of the Committee on Traffic and Public Safety directed that you be requested to advise whether confliction exists between Section 50 of the Uniform Act Regulating Traffic on Highways and Section 26 of the Illinois Motor Vehicle Law, as to the right of cities to prescribe speed limitations under certain conditions."

Section 26 of the "Motor Vehicle Law" is in part as follows:

"* * * no city, town or village or other municipality shall have power to make any ordinance, by-laws or resolutions limiting or restricting the speed of motor vehicles or motor bicycles, and no ordinance, by-law or resolution heretofore or hereafter made by any city, village or town or other municipal corporation within this State, by whatever name known or designated, in respect to or limiting the speed of motor vehicles or motor bicycles shall have any force, effect or validity, and they are hereby declared to be of no validity or effect;"

Section 49 (a) of the "Uniform Act Regulating Traffic on Highways" is as follows:

"Sec. 49. Speed Restrictions.—(a) No person shall drive a vehicle of the first division as described in article I of this Act, upon any public highway in this State at a speed greater than is reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person. If the rate of speed of any motor vehicle of said first division, operated upon any public highway in this State where the same passes through the business district of any city, village or incorporated town exceed twenty (20) miles an hour, or if the rate of speed of any such motor vehicle operated on any public highway in this State where the same passes through the residence district of any city, village or incorporated town exceeds twenty-five (25) miles an hour, or if the rate of speed of any such motor vehicle operated on any public highway in this State in a suburban district, exceeds thirty-five (35) miles an hour, such rates of speed shall be *prima facie* evidence that the person operating such motor vehicle is running at a rate of speed greater than is reasonable and proper having regard to the traffic and use of the way or so as to endanger the life or limb or injure the property of any person."

Section 50 of the same Act provides:

"Sec. 50. When Local Authorities May Alter *Prima Facie* Limits.—(a) Local authorities with respect to streets under their jurisdiction may determine, upon the basis of an engineering and traffic investigation that the *prima facie* speed permitted under this Act at any intersection is greater than is reasonable or safe under the conditions found to exist at such intersection, such local authority shall determine and declare a reasonable and safe *prima facie* speed limit thereat, which shall be effective when appropriate signs giving notice thereof are erected at such intersection or upon the approaches thereto.

(b) Local authorities with respect to streets under their jurisdiction may in their discretion authorize by ordinance higher *prima facie* speeds than those stated in section 49 upon through highways or upon highways or portions thereof where there are no intersections or between widely spaced intersections provided signs are erected giving notice of the authorized speed, but local authorities shall not have authority to modify or alter the basic rule set forth in subdivision (a) of section 49 or in any event to authorize by ordinance a speed in excess of 45 miles per hour."

Neither the "Motor Vehicle Law" or the "Uniform Act Regulating Traffic on Highways" provides a speed limit measured in miles per hour for motor vehicles of the first division. Section 49 (a) quoted above does set up a basic rule which is as follows:

"No person shall drive a vehicle of the first division as described in Article I of this act, upon any public highway in this State at a speed greater than is reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person."

The section then provides that if the rate of speed of any such motor vehicle where the same passes through certain designated districts in a city, village or incorporated town, exceeds a certain designated number of miles per hour, varying according to the congested nature of the district, then such rates of speed shall be "*prima facie* evidence" that the person operating such motor vehicle is running at a rate of speed greater than is reasonable and proper having regard to the traffic and use of the way or so as to endanger the life or limb, or injure the property of any person.

By Section 50 (a) Local Authorities are given power with respect to streets under their jurisdiction to alter the *prima facie* limits fixed in Section 49. If the Local Authority after investigation determines that the *prima facie* speed permitted under this Act at any intersection is greater than is reasonable or safe under the conditions found to exist at such intersection, it may determine and declare a reasonable and safe *prima facie* speed limit thereat, which shall be effective when appropriate signs giving notice thereof are erected at such intersection.

Section 50 (b) authorizes Local Authorities with respect to streets under their jurisdiction in their discretion by ordinance to fix higher *prima facie* speeds than those provided in Section 49 upon through highways or upon highways where there are no intersections or widely spaced intersections provided signs are erected giving notice of the authorized speed, but they shall have no power to modify the basic rule set forth in Subdivision (a) of Section 49 or to authorize a speed in excess of 45 miles per hour.

There is a vast difference between fixing a maximum speed limit the violation of which is proof of guilt and the fixing of a speed limit the exceeding of which shall be *prima facie* evidence of the violation of a basic rule for safe driving. By the Motor Vehicle Act a city is prohibited from doing the former and by the Uniform Traffic Act it may do the latter. In our opinion there is no conflict between the two sections referred to in your letter. *Prima facie* evidence has been defined as that degree of proof which, unexplained or uncontradicted, is alone sufficient to establish the truth of a legal principle asserted by a party. 3 Words and Phrases (2nd series) 1175. The term "*prima facie* evidence" implies evidence which may be rebutted and overcome, and the provision in question merely establishes a rule of evidence. [*Meadowcraft v. People*, 163 Ill. 56 (1896).]

It is our opinion therefore that the law prohibiting municipalities from limiting the speed of motor vehicles does not conflict with the other law which authorizes municipalities to determine the rates of speed the exceeding of which shall be "*prima facie* evidence" of reckless driving.

INSPECTION OF MOTOR VEHICLE HEADLIGHTS

(No. 10155—Public Vehicle License Commissioner—A. C.—December 4, 1939—3½ pp.)

If a motor vehicle submitted for inspection is not equipped with properly aimed headlights, the Public Vehicle License Commissioner is authorized to refuse to issue the safety inspection sticker. The characteristics of a proper headlight is a question of fact to be determined in accordance with the rules established by the State Department of Public Works and Buildings and the City Public Vehicle License Commission.

Citations:

Statutes: IRS '39, 95½: 26b, 122, 201, 204, 208, 220.

Ordinances: Mun. Code: 27-83 to 27-88.

Other reference: State Department of Public Works and Buildings, rules and regulations, sec. 10, par. 1.

OPINION OF FOREGOING SYNOPSIS

We have your letter of recent date and the documents thereto attached. It appears from said communication that Mrs. Clarence W. Hortsman submitted her automobile to your commission for inspection and that a safety sticker was refused her on the ground that the headlights on said vehicle were not properly aimed. It is contended by Mr. Hortsman, an attorney, that your commission has no authority to inspect headlights and that therefore his wife is entitled to a safety inspection sticker. You request our opinion in the matter.

Chapter 95½, paragraph 26b, of the Illinois Revised Statutes 1939, provides in part as follows:

"Any city, village or town having a population of 40,000 or over, may, by ordinance, require the resident owner of a motor vehicle to submit, not more often than semi-annually, such motor vehicle for inspection to determine the efficiency of the equipment required by this Act for safe operation on public highways. * * *

Chapter 95½, paragraphs 201 and 204, of the Illinois Revised Statutes 1939, provides for the kinds of lights to be used on vehicles.

Chapter 95½, paragraph 208, of the Illinois Revised Statutes 1939, provides for the dimming or dropping of headlights on approaching another vehicle proceeding in an opposite direction.

Chapter 95½, paragraph 122, of the Illinois Revised Statutes 1939, provides that the act shall be applied uniformly throughout the State and authorizes the local authorities to adopt additional traffic regulations which are not in conflict with the provisions of the act.

Chapter 95½, paragraph 220, of the Illinois Revised Statutes 1939, which authorizes the establishment of testing stations and the making of safety tests, provides in part as follows:

" * * * The test provided for in this section shall include the testing and inspection of brakes, lights, horns, reflectors, rear vision mirrors, safety chains, frame, axles, cab and body, or cab or body, wheels, steering apparatus, and other safety devices and appliances required in this Act for trucks, trailers and semi-trailers.

* * *

"The Department shall conduct tests and make investigations to determine the kind and type of equipment necessary to test the brakes, lights, frame, wheels, steering apparatus, including camber and caster of the axle, and toe-in and tracking of the wheels, and all other devices and appliances referred to in this Act; and shall make public its findings and shall furnish upon request a list of the various testing devices approved by it.

* * *

"The Department shall investigate complaints of violations of rules or regulations issued by the Department upon its own motion or upon charges made in writing, * * *.

* * *

"The certificates, all forms and records, reports of tests and retests, and the full procedure and methods of making the tests and retests, shall be in the form prescribed by the Department; * * *."

While the last above quoted provisions relate in the main to trucks, it is believed that a reading of the Motor Vehicle act in its entirety will support the conclusion that the State department is authorized to establish rules and regulations to govern the department.

Section 10, paragraph i, of the manual of rules and regulations of the Department of Public Works and Buildings, provides that "Light beams must not be aimed so high that they blind an approaching driver and must not be aimed so low that a vehicle or object 200 feet ahead will not be illuminated."

Sections 27-83 to 27-88 of the Municipal Code of Chicago, provide for the inspection of motor vehicles owned by a resident of the city.

The rules of your Commission, which conform with those adopted by the Department of Public Works and Buildings, with reference to testing lane standards, provide as follows:

"High intensity headlight beam *top* is permitted to be two inches higher than *level*, which represents maximum distance of illumination, and glare is to be controlled by depressing beam when approaching oncoming vehicles on highways; also, high intensity beam *top* is permitted to be no lower than five inches *below level*, which represents a minimum of 200 feet illumination."

As we view the matter, the statute specifically provides for the maintenance of proper lights. The State Department has been authorized to pass rules and regulations regarding the testing of certain motor vehicles, and rules have been passed applicable to said department; and it is provided in the statute that the act be applied uniformly throughout the State. What is a proper headlight is a question of fact to be determined by your Commission under general rules applicable to all persons. The rules established by the State Department and by your Commission should govern, because proper rules and regulations adopted pursuant to statutory authority are as much a part of the law as a statute or ordinance.

It is, therefore, our opinion that if Mrs. Hortsman's motor vehicle is not equipped with properly aimed headlights, you are authorized to refuse to issue the safety inspection sticker.

The documents attached to your letter are returned herewith.

INSPECTION OF NON-RESIDENT MOTOR VEHICLES

(No. 9859—*Public Vehicle License Commissioner—G. A. H.—July 14, 1938—2 pp.*)

The Public Vehicle License Commissioner has no authority to supervise out-of-town or out-of-state owners of motor vehicles with reference to the safe mechanical condition of their motor vehicles while operating on the streets of the City.

Citations:

Statute: IRS '37, 95½: 26b (Revised Motor Vehicle laws, sec. 21-c).

Ordinance: Code '31: 2061-B.

SERVICE OF SUMMONS ON TRAFFIC VIOLATIONS

(No. 10019—*Subcommittee on Traffic and Public Safety—M. H. F.—May 23, 1939—4 pp.*)

Legal service of summons for traffic violations could not be accomplished by attaching a copy of the writ to the automobile of the offenders. But such notice may be worthy as a practical measure and the objectors could be sued in the ordinary statutory manner.

Citations:

Statutes: IRS '37, 37: 357 et seq.

Civil Practice act, sec. 13.

Other reference: 18 Op. Corp. Coun. 665 (No. 7403).

WARNING TICKETS FOR TRAFFIC CODE VIOLATORS

(No. 9810—*Alderman, 9th Ward—M. H. F.—April 11, 1938—1½ pp.*)

The Uniform Traffic code may be amended to provide for the issuance by the Police Department of warning tickets to violators of designated provisions of the traffic code.

ARREST OF A FEDERAL EMPLOYEE FOR A TRAFFIC VIOLATION

(No. 10104—*Federal Emergency Administration of Public Works—L. L. K.—September 21, 1939—2 pp.*)

A federal employee, even while on duty, is not immune by virtue of his employment from arrest for a traffic violation.

Citations:

Cases: Commonwealth v. Closson, 229 Mass. 329 LRA 1918 C 939 (1918).

Ex parte William, 277 Fed. 819 (1921).

Johnson v. Maryland, 254 US 51, 56 (1920).

Other reference: McQuillin, Municipal Corporations (2nd ed.), v. 2, sec. 835, pp. 42, 624, 625, 849.

URINALYSIS TEST IN PROSECUTION OF INTOXICATED DRIVING

(No. 9759—Commissioner of Police—M. H. F.—January 20, 1938—
2½ pp.)

A competent urinalysis test to determine the amount of alcohol an individual has taken internally should be admissible as evidence in a prosecution for intoxicated driving. The constitutional privilege that an accused person cannot be compelled to give evidence against himself is not intended to exempt an accused person from an exposition of physical or natural marks, distinctions, or characteristics, but is confined to testimonial utterances.

Citations: *State v. Duguid*, 72 P (2d) 435 (Ariz. 1937).
State v. Graham, 116 La. 779, 41 So. 90 (1906).

OPINION OF FOREGOING SYNOPSIS

We have read Judge Braude's letter as copied in your communication to this department dated January 13, 1938. The judge advocates the use by the Chicago Police Department of the Heise test in drunken drivers' cases which are tried in the Safety Court branch of the Municipal Court of Chicago, said test being a urinalysis test for the purpose of determining the amount of alcohol an individual has taken internally. It is proposed that when the police arrest a driver for operating an automobile while under the influence of intoxicating liquor that they secure, voluntarily, from the defendant a specimen of his urine, that the specimen be examined chemically and proof of the results of the chemical analysis be submitted in evidence upon the trial of the defendant.

Whether urinalysis tests for alcohol in body fluids are specific and reliable is a matter which we believe should be decided by the city's Board of Health. Assuming them to be reliable, then if the police department were to make use of the tests it would be required to show by competent evidence that the specimen examined was voided by the defendant and voided by him within a reasonable time after the accident and what the test showed. What a reasonable time would be would depend upon the determination of the scientific question of how long alcohol remains in body fluids and within what time after the automobile accident the test would be valuable.

So far as we know the Illinois courts of review have not ruled upon the question of the admissibility in evidence of such tests in cases involving drivers charged with operating motor vehicles while under the influence of intoxicating liquor. The Supreme Court of Arizona, however, in the case of *State v. Duguid*, 72 P. (2d) 435, decided October 5, 1937, has held that in a prosecution for driving an automobile on the public highways while under the influence of intoxicating liquor, where the accused voluntarily furnished a sample of urine for analysis, a physician's testimony regarding the results of the chemical analysis of the accused's urine for ethyl alcohol content was admissible in evidence, as against the contention that the accused was compelled to give evidence against himself, though the accused did not know at the time he gave the specimen why he was being subjected to test. The court quoted with approval from the case of *State v. Graham*, 116 La. 779, 41 So. 90, wherein it was said:

"The tendency of the more modern case is to restrict the constitutional privilege against compulsory self-crimination to confessions,

and admissions proceeding from the accused, and to open the door to the reception of all kinds of 'real evidence' or proof of physical facts, which speak for themselves."

No reason is seen by us why the Illinois courts should decide the question differently. Our opinion is that the constitutional privilege is not intended to exempt an accused from an exposition of physical or natural marks or distinctions or characteristics but is to be confined to testimonial utterances.

Regarding the offer of a private laboratory to furnish free of charge to the city the necessary receptacles and to make the urine analysis, our thought is that the city's Board of Health should make the tests or at least have direct supervision over them.

SENTENCING OF TRAFFIC OFFENDERS TO ATTEND TRAFFIC SCHOOL

(No. 9812—Chairman, Subcommittee on Accident Prevention—M. H. F.—April 14, 1938—2 pp.)

The judges of the municipal court may vacate judgments awarding fines for violations of the State Uniform Traffic act upon a showing to them that the offenders have satisfactorily completed courses of instruction given by a traffic school maintained by the City. They could not, however, sentence violators of the State Uniform Traffic act to attend the school.

Citations: IRS '37, 95½: 98 to 239.

TRAFFIC PROHIBITION AGAINST OVERTAKING AUTOMOBILES

(No. 10018—Subcommittee on Traffic and Public Safety—M. H. F.—May 23, 1939—2 pp.)

A traffic regulation which would provide that a vehicle with a rated capacity of more than 3,000 pounds or with a seating capacity of more than 7 persons shall not overtake, pass or drive parallel to any automobile moving in the same direction, appears to be of doubtful validity. This amendment would be strengthened if it were restricted to the overtaking of automobiles moving at a rate of more than 20 miles per hour.

FEEs FOR LIMITED PARKING SIGNS

(No. 10008—Acting Commissioner of Streets and Electricity—M. H. F.—May 17, 1939—2 pp.)

The provisions in the Uniform Traffic code relating to the payment of prescribed fees for the erection and maintenance of signs apply also to signs designating the prohibition of parking for limited periods of time at only certain locations.

Citations: Revised Uniform Traffic code, art. III, sec. 6.
Coun. J. (1936-37), p. 3110.

PARKING PROHIBITION TO ALLOW FIRE ENGINES ACCESS TO CHICAGO RIVER

(No. 9754—Fire Commissioner—A. F. G.—January 14, 1938—3½ pp.)

The Department of Streets and Electricity has sufficient power under present ordinances to prohibit parking at certain points along the lower level of Wacker drive by placing signs at those points so that space will be available to fire engines to pump water from the Chicago river when necessary.

Citations: Revised Uniform Traffic code, art. I; art. II: sec. 3; art. III: sec. 6; art. V: sec. 19.
Coun. J. (1936-37), p. 2802.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your letter of January 4, 1938 in reference to the prohibition against parking automobiles in certain sections along the lower level of Wacker drive. You say:

"Pursuant to the request contained in attached letter, the Commissioner of Public Works caused to be painted on the pillars at various locations along the lower level of the south bank of the river, signs reading, "NO PARKING—RESERVED FOR FIRE DEPARTMENT."

The part of the attached letter referred to above which it is necessary to quote is as follows:

"In order that the south bank of the river may be made available for our pumping engines in the event it should become necessary to suction water from the river, a space of approximately 24 feet between the pillars, in each block, should be left and kept unoccupied, the space being properly designated by signs, prohibiting the parking of automobiles, etc."

You then ask that we advise you whether or not an ordinance specifically prohibiting the parking of automobiles in these various spaces is necessary and, if so, that we prepare the necessary amendment.

The Code provisions regulating the parking of automobiles in such cases as this are to be found in the Revised Uniform Traffic Code of the City of Chicago, Council Proceedings December 9, 1936, page 2802.

In Article I, Definitions, there are the two following definitions, among others:

"Official Traffic Signs. All signs, markings and devices, other than signals, not inconsistent with this ordinance, placed or erected by authority of the Department of Streets and Electricity, for the purpose of guiding, directing, warning or regulating traffic."

"Parking. The standing of a vehicle whether occupied or not, upon a roadway, for a period of time greater than is reasonably necessary for loading or unloading or in obedience to traffic regulations or official traffic signs or signals."

Section 3, Article II is as follows:

"Section 3. Department of Streets and Electricity Authorized to Adopt Regulations). The Department of Streets and Electricity is hereby empowered to make regulations necessary to make effective the provisions of this ordinance and to make and enforce temporary regulations to cover emergencies or special conditions."

Section 6, Article III reads in part as follows:

"Section 6. Signs and Signals). The Commissioner of Streets and Electricity shall determine and designate the character of all official signs and signals. It shall be his duty to place and maintain, or cause to be placed and maintained all official signs and signals herein required. All signs and signals designated for a particular purpose shall be uniform, and space shall be provided for the emblem of the erecting authority."

Section 19, Article V is as follows:

"Section 19. Stopping Prohibited in Specified Places). It shall be unlawful for the operator of a vehicle to stop, stand or park such vehicle in any of the following places, except when necessary to avoid conflict with other traffic or in compliance with the directions of a police officer or official traffic sign or signal:"

Subsection (13) of the section last quoted is as follows:

"(13) At any place where official traffic signs have been erected prohibiting stopping; standing and parking."

From the foregoing we are of the opinion that there is ample power in the Department of Streets and Electricity, particularly under Section 3, Article II, which empowers it "to make and enforce temporary regulations to cover emergencies or special conditions."

In your letter to the department you pointed out the necessity of providing regulation of the "special condition" existing along the south bank of the Chicago river at Wacker drive from the standpoint of fighting fire, and the department under the power vested in it by ordinance erected "official traffic signs" uniform for the "particular purpose."

While we do not believe a special ordinance to cover this situation is necessary, Mr. Sorenson, City Traffic Engineer, advises us that in view of the recommendation of Judge Gutknecht his department has prepared an ordinance to meet this special purpose.

PARKING IN FRONT OF THEATERS

(No. 10082—*Fire Commissioner—H. R. P.—August 17, 1939—2 pp.*)

Under existing ordinances, the parking of vehicles in front of all main theaters, stage entrances or the alleys adjacent thereto is not prohibited, but the Council may have prohibited parking in front of certain theaters in the loop.

To obviate the necessity of specific ordinances for individual theaters, the City Council may properly pass a general ordinance prohibiting parking in front of main theater entrances, stage entrances or alleys adjacent thereto.

Citations:

Ordinance: Revised Uniform Traffic code, Coun. J. (1936-37), p. 2801, sec. 27.

Cases: City of Chicago v. McKinley, 344 Ill. 297 (1931).
Haggengos v. City of Chicago, 336 Ill. 573 (1930).

LOAD LIMITS AS APPLIED TO BUSES

(No. 10056—Alderman, 10th Ward—J. J. D.—July 21, 1939—2 pp.)

Large motor buses are properly included within the term "vehicle" in the City's traffic code as used in connection with load limitations on City streets.

Citations:

Statute: III. Stat. (Jones Ann.), par. 85.001.

Ordinance: Uniform Traffic code.

FUNERAL CAR CARD

(No. 9985—Commissioner of Police—M. D. S.—April 13, 1939—2 pp.)

A sticker approximately 11 inches long and 3½ inches wide with the word "funeral" in large purple letters on a stipled purple and white background for use on funeral cars does not conform with the ordinance which requires that the funeral car card be white with a purple cross or star.

Citation: Uniform Traffic code, sec. 43 (b).

CHAPTER X

PUBLIC UTILITIES

A. RAILROADS

REMOVAL OF RAILROAD TRACKS FROM STREETS

(No. 9782—Chairman, Subcommittee of the Committee on Finance—
F. V. M.—February 24, 1938—7 pp.)

The City is estopped from forcing railroad companies to remove tracks and structures from the streets and alleys when the railroad has occupied those streets and alleys since 1901.

Citations:

Ordinances: Track elevation ordinances of January 4, 1898 and September 3, 1907.

Cases: Chicago, Rock Island and Pacific RR. v. City of Joliet, 79 Ill. 25 (1875).

Jordan v. City of Chenoa, 166 Ill. 530 (1897).

Chicago v. Union Stockyards and Transit Co., 164 Ill. 224 (1896).

People v. City of Rock Island, 215 Ill. 488 (1905).

OPINION OF FOREGOING SYNOPSIS

In response to your verbal request of February 3, 1938 at the meeting of your subcommittee of the Committee on Finance, please be advised that the City Map Department has made an examination of the attached sketches marked Exhibits A and B and the track elevation ordinances passed by the City Council on January 24, 1898 and September 3, 1907, respectively, and states that the right-of-way of the Chicago, Burlington and Quincy Railway Company outlined thereon is part of the said right-of-way which is included in said ordinances, thereby substantiating the statement made by the attorney for the railway company in its letter to you dated February 3, 1938.

It appears from this letter that the railway company bases its right to the occupancy of the streets and alleys designated on sketches marked Exhibits A and B on the track elevation ordinances above referred to. The attorney for the railway company states in this letter that the additional strips of land, approximately 25 feet wide, upon which the tracks which cross these streets and alleys had been constructed were purchased in 1890, 1891 and 1892, long before said track elevation ordinances were passed.

It is further stated that ever since these strips of land were purchased they have been assessed for taxes as right-of-way by the State Board of Equalization and the State Tax Commission.

The railway company maintains that by reason of the foregoing these additional tracks are established as part of its right-of-way and that these streets and alleys were vacated by the ordinances of January 24, 1898 and September 3, 1907.

Our letter to you of February 15, 1938, in which we inquired as to the length of time these streets and alleys had been occupied by the railway company, has been returned with a notation "April 8, 1901."

Therefore, without comment on the claims of the railway company under the terms of the foregoing ordinances, we believe its right to the occupancy to the streets and alleys in question is based on the length of time of its occupancy and the principle of estoppel.

In the case of *C. R. I. & P. R. R. Co. v. City of Joliet*, 79 Ill. 25, which was an action brought to restrain the operation of the railroad over the "public ground" and over its crossings of certain streets, the court said on page 37:

"It is not necessary to rest the right of the railroad company upon the statute under which the road was located and the grant of the right of way by the county.

"The validity of these grants, and the rights of the railroad company under them, have, as we regard the evidence, been recognized by the express action of the city of Joliet for a period of over 20 years."

and on page 39:

"There is a conflict among the authorities whether the rights of a municipality or of the public may be lost by non-user, or adverse possession. There are cases which hold that the public may lose their right to streets or public places by long continued adverse occupation by private individuals. A number of them may be found collected in the note to section 529, in the work of Dillon, before quoted. Upon a review of the cases upon this subject, that author, in section 533, states, as his conclusion, that he 'can not assent to the doctrine that, as respects public rights, municipal corporations are within ordinary limitation statutes. * * * But there is no danger in recognizing the principle of an *estoppel in pais* as applicable to such cases, as this leaves the courts to decide the question, not by the mere lapse of time, but by all the circumstances of the case, to hold the public estopped or not, as right and justice may require.'"

and on page 40:

"We think there is sufficient warrant of authority for the application of the principle of an equitable estoppel to a case of the character disclosed by this record, and that it should be applied here."

In *Jordan v. City of Chenoa*, 166 Ill. 530, a bill in equity was brought by the city of Chenoa, against Roscoe G. Jordan, to enjoin him from closing up an alley which had been fenced up by him twenty years previously. On page 536 the court said:

"It is not claimed, nor could it be successfully, that the Statute of Limitations has run against the city. Municipal corporations, in all matters involving mere private rights, are subject to limitation laws in like manner as individuals, but in all matters involving public rights they are not subject to the limitation laws as such. (*City of Piatt v. Goodell*, 97 Ill. 84.) Where streets and alleys have been dedicated and accepted they are held by the municipality in its public capacity. They are held in trust for the benefit of the general public, and when so held the Statute of Limitations will not run in favor of a private individual to bar the rights of the public. But while the Statute of Limitations does not apply in cases of this character, the defense of equitable estoppel from abandonment or non-user may be invoked. As an illustration of this doctrine, in *Lee v. Town of Mound Station*, 118 Ill. 304, in the discussion of the question, it was said (p. 317): 'It is true that we have held that where the public have long withheld the assertion of control over streets, and private parties have been, by the acts of those representing the public, induced to believe the streets abandoned by the public, and on the faith of that belief, and with the acquiescence of those representing the public, they have placed themselves, by making structures or improvements in the street, in a situation where they must suffer great pecuniary

loss if those representing the public be allowed afterwards to allege that the street was not abandoned, the doctrine of equitable estoppel may be applied.'

"Under the rule established by the cases cited, we think it is clear the city of Chenoa, in July, 1895, had no right to open the alleged alley. The court therefore erred in rendering a decree making the injunction perpetual. That decree will be reversed and the cause remanded, with directions to dismiss the bill.

Reversed and remanded."

The tracks in question were elevated, undoubtedly, at considerable expense to the railway company, an element which must be considered in connection with its right of occupancy at the present time.

In *City of Chicago v. The Union Stock Yards and Transit Co.*, 164 Ill. 224, in which was filed a bill in equity to restrain the City of Chicago and the Commissioner of Public Works from removing, or causing to be removed, the railroad tracks, side-tracks, switches and turn-outs which constitute the railroad connecting the company stock yards on the west with the Illinois Central and Michigan Central railroads on the east, the court said on page 230:

"It is in the first place contended by appellant that appellee has not maintained its right to the decree enjoining appellant from removing the railroad tracks from the streets in question, because, as it is claimed, there is no competent evidence in the record that appellee ever obtained the consent of the municipal authorities of the village of Hyde Park and town of Lake, through which village and town the railroad was built, to lay the tracks across such streets. It is not denied that such consent was necessary, but appellee insists that the required consent was in fact given, although no record of the action of the village and town authorities in respect to the matter could be found. Much of the argument is devoted to the question of the competency of the testimony of numerous witnesses admitted by the court on behalf of appellee to prove that meetings of the village and town authorities were in fact held and consent voted to lay the tracks across the streets in question, without any sufficient proof that any record of any such meetings and vote was ever made, or if made, could not, upon proper search, be found. We do not deem it necessary in the decision of the case to enter upon any discussion of either the evidence or the law on this branch of the case. We are satisfied that the evidence, when fully and fairly considered, shows that the municipal authorities, respectively, of the village and town and of their successor, the city of Chicago, have, by long acquiescence and by many affirmative acts, recognized the right of appellee to maintain and operate its road across these streets. During the period of more than twenty years since the last track was laid appellee has, in obedience to the commands of the municipal authorities, expended considerable sums of money in improvements at the street crossings, in constructing and repairing culverts, planking the crossings, erecting and maintaining safety gates and electric lights, constructing plank and cement walks, and other improvements beneficial to the general public and the municipalities as well as to the appellee itself. The board of trustees of Hyde Park approved the plat of the right of way of appellee through the village in 1883, and the same year adopted a resolution permitting private parties to lay tracks to their coal yards connecting with appellee's road as laid, gave permission to appellee to build depots, and from time to time, before the annexation of the village to Chicago, passed many orders and resolutions making mention of these tracks as established monuments in fixing grades and directing other public work. The same course of recognition was followed after annexation by the city of Chicago, up to within a short time before the passing of the resolution directing the removal of the tracks, and it is now too late for appellant to raise the

question of the lack of original consent of its predecessors to the laying of the tracks. It is estopped therefrom upon the plainest principles of equity, and the subsequent ratification shown upon this record should be deemed equivalent to precedent authority. * * *

In *The People v. City of Rock Island et al.*, 215 Ill. 488, which was an action for writ of mandamus commanding the City of Rock Island and the Davenport, Rock Island and Northwestern Railway Company, to remove a depot building, freight building and freight platform from Mississippi street in the city of Rock Island, the court said on page 495:

"It has frequently been decided that the doctrine of estoppel *in pais* is applicable to municipal corporations, but that they will be estopped or not, as justice and right may require. There may be cases where, under all the circumstances, to assert a public right would be to encourage and promote a fraud. Where a party acting in good faith under affirmative acts of a city has made such expensive and permanent improvements that it would be highly inequitable and unjust to destroy the rights acquired, the doctrine of equitable estoppel will be applied. The hardships that would result from a contrary holding, and the necessity of raising an estoppel in particular cases to prevent fraud and injustice, have induced the establishment of the rule, and it has been several times said that there is neither danger to the public nor injustice in the application of the doctrine. In the exercise of proper diligence the public authorities may prevent encroachments upon public right, and if they do not, any citizen may take the necessary steps to do so, and if there is not only a failure to act by either, but affirmative action by the public authorities with the apparent approval of every one interested, under which the situation is changed and permanent improvements are made, the principles of equity require that the public should be estopped. The doctrine has been applied in *Chicago, Rock Island and Pacific Railroad Co. v. City of Joliet*, 79 Ill. 25, *Chicago and Northwestern Railway Co. v. People ex rel.* 91 id. 251, *County of Piatt v. Goodell*, 97 id. 84, *Martel v. City of East St. Louis*, 94 id. 67, and *City of Chicago v. Union Stock Yards and Transit Co.* 164 id. 224. We think this a proper case for the application of the doctrine. Permanent improvements and great expenditures have been made which would not have been made but for the positive action of the city and its officers, and to compel the abandonment of the premises for use as depot grounds would be contrary to natural justice. * * *

There are many other cases in the reports in which by reason of long occupancy under like conditions the people have been held estopped from forcing railroad companies to remove their tracks and structures from public property and we are, therefore, of the opinion that the Chicago, Burlington and Quincy Railway Company for the same reason is entitled to occupy the streets and alleys designated on sketches A and B and hereto attached.

OBTAINING EASEMENT FROM A RAILROAD COMPANY

(No. 10073—Commissioner of Public Works—W. V. S.—August 8, 1939—3 pp.)

A railroad company cannot transfer, sell or otherwise dispose of its property without the approval of the Illinois Commerce Commission. Hence the approval of the said Commission is essential to the validity of an easement from a railroad company granting permission to the City to construct water mains under its tracks.

Citations:

Statute: IRS '37, 111½: 27.

Case: C&W RR. Co. v. Englestein, 333 Ill. 117 (1928).

ACCEPTANCE OF EASEMENT FROM RAILROAD

(No. 10138—City Comptroller—D. L. L.—November 16, 1939—2½ pp.)

The City Comptroller may accept and record an easement to the City from a railroad company when the City Council passed an ordinance providing for the acquisition of said easement upon acceptance by the railroad companies. The railroad companies had accepted this ordinance, and certified copies of the resolution of the board of directors of each company authorizing the easement produced.

SUBWAY LIGHTING

(No. 9775—Acting Commissioner of Streets and Electricity—J. J. D. February 16, 1938—6½ pp.)

There is no obligation on the part of the City to operate or maintain subway lights and lights on the center column fixtures in the new railway subway at Stony Island avenue south of 95th street. The City has no jurisdiction over the highway which passes through the subway, and the State Highway Department has assumed full responsibility for the construction and maintenance of the highway.

Citation: IRS '37, 121: 297, 298.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your request for an opinion "as to the obligation of the City in operating and maintaining both the subway lights and the center column fixtures" in the new Chicago and Western Indiana Railroad and the New York Chicago and St. Louis Railroad joint subway on Stony Island avenue south of 95th street.

This is the first instance that has come to our attention wherein the question of the responsibility of the city for the operation and maintenance of subway and center column lights is raised in connection with a State highway project constructed by the Department of Public Works and Buildings of the State of Illinois and financed by the Federal Government in accordance with certain provisions of the National Industrial Recovery act under an order of the Illinois Commerce Commission.

The petition under which the said subway was authorized was filed by the Department of Public Works and Buildings, Division of Highways, State of Illinois:

- (A) For permission to extend State Bond Issue Route 42 underneath the tracks and across the rights of way of the respondent railroad companies by means of a subway for the highway on Stony Island avenue near 95th street in the said City of Chicago, Illinois; and
- (B) For the approval of separate agreements covering the construction, maintenance and expense of the subway thus to be formed.

It appears from a copy of the order entered in the case that the City of Chicago was a party respondent in said proceeding.

The aforesaid order of the Illinois Commerce Commission contained, among others, the following provisions:

- (1) "That the Department of Public Works and Buildings, Division of Highways, State of Illinois, * * * be authorized and permitted to extend State Bond Issue Route 42 underneath the tracks and across the rights of way of the New York Chicago and St. Louis Railroad Company and the Chicago and Western Indiana Railroad Company by means of a subway for the highway at the point where the said route now crosses the said tracks at grade on Stony Island avenue near 95th street in the City of Chicago, County of Cook, Illinois, as set forth in its petition in this case and in full accordance with the terms and conditions of the work plans attached to the separate agreements entered into with the respondent railroad companies covering the construction, *maintenance* and expense of the proposed subway.
- (2) "That the said agreements cover *all matters* relative to construction, *maintenance* and expense of the proposed subway.
- (3) "*After the completion of the grade separation project* * * * the State, at its sole expense, shall maintain the pavement, curb or gutter on the approaches and throughout the subway, the highway drainage system and all other highway facilities and *the railroad at its sole expense shall maintain the bridge structure, its roadbed and tracks and all other railroad facilities.*"
- (4) Exhibit (1), a part of the agreement, provides that the highway department shall furnish all material and labor for complete deck and lighting system, complete *for the New York Chicago and St. Louis Railroad bridge and for the Chicago and Western Indiana Railroad bridge.*

In our opinion it is significant that this subway was constructed as a part of a State highway project. In chapter 121, paragraph 298, page 2801, Ill. State Bar Stats., 1937, it is provided that:

"When a part or portion of the highway shall have been taken over it shall thereafter be constructed, reconstructed, repaired, improved and *maintained* by the State in accordance with the provisions of this act."

Section 297, chapter 121, Ill. State Bar Stats., 1937, the Roads and Bridges act, provides that whenever any part or portion of any highway which is a part of the State highway system and lies and is situated within the limits of any city, village or incorporated town is taken over, the Department of Public Works and Buildings shall have "exclusive jurisdiction" and control of that part of such highway as the State has constructed and for the maintenance of which the State is responsible.

Under Section 57 of the present Public Utilities act the Illinois Commerce Commission is given power "to require every public utility to maintain * * * its equipment or other *property in such manner as to promote and safeguard the health and safety of its employees, passengers, customers and the public* and to this end prescribe, among other things, the installation, use, *maintenance and operation* of appropriate safety or other devices * * * and to *require the performance of any other act which the health or safety of its employees, passengers, customers or the public may demand.*"

The original track elevation ordinance under which it was contemplated this subway should be constructed contained the following provision:

"Par. 2. The railroad and railway companies hereinbefore mentioned *are hereby required to light the subways, passageways and grade crossings* provided for in Section 4a of this ordinance in the manner prescribed by ordinance now in force or that may hereafter be passed relative to the lighting of railroad crossings in the City of Chicago."

We have quoted at length and referred to various authorities in order that a complete picture may be obtained of the circumstances under which

the present question has been presented to us for decision. In arriving at our conclusion as to the responsibility of the city to operate and maintain lights in this subway and on the center columns, the following significant factors should be considered:

- (1) That while the City of Chicago was a party respondent to the proceeding which authorized the construction of this subway, the Illinois Commerce Commission did not see fit in its order to require the city to either operate or maintain any part of the structure, including subway lights and lights on center columns.
- (2) That the city was not a party to the agreements under which the said structure was constructed, while the railroads involved were parties to such an agreement and accepted the commission's order that "said agreements cover all matters relative to the construction, maintenance and expense of the proposed subway."
- (3) That the railroads also accepted that part of the Illinois Commerce Commission order which provided that *the railroads at their sole expense should maintain the bridge structure*. From the blue prints submitted as part of the agreements referred to it cannot be denied that the lighting facilities are a part of the bridge structure and that therefore it necessarily follows that the railroads assumed the sole expense of the maintenance of the same. Exhibit 1, which is a blue print and part of the agreements, provides that the State Highway Department shall furnish "complete deck and lighting system for the New York Chicago and St. Louis bridge and for the Chicago and Western Indiana bridge." This would further support the conclusion that the lighting facilities were a part of the bridge structure which the railroads agreed to maintain at their sole expense.
- (4) That under the provisions of the present Public Utilities act the Illinois Commerce Commission has jurisdiction to require either railroad company to "maintain its equipment or other property in such manner as to promote and safeguard the health and safety of * * * the public * * * and to require the performance of any other act which the health or safety * * * of the public may demand."

The facts that the City of Chicago has no jurisdiction over this highway, that the State Highway Department has assumed full responsibility for its construction and maintenance and that the Commerce Commission is presumed to have had this fact in mind when it wrote its order indicate that it was not intended by the Commission that the city should incur any expense with reference to lighting facilities either as to the subway or to the supporting columns of the bridge structure.

It is a further reasonable presumption that the Commerce Commission's order covered every pertinent phase of the construction and maintenance of the subway structure and it certainly cannot be presumed that the Commission intended the subway and supporting columns to be without lights when it approved an agreement providing for the installation of such equipment as a part of the bridge structure and further ordered the railroads to maintain said structure.

The fact that the terms of the original track elevation ordinance under which this subway was contemplated required the railroads to light this subway, while not in itself controlling, is, in our opinion, a further indication that the city has no responsibility with reference to the maintenance or operation of the lighting system referred to.

Considering all the above circumstances and facts, we are of the opinion that there is no obligation on the part of the city to operate or maintain subway lights and lights on the center column fixtures in the new railroad subway at Stony Island avenue south of 95th street mentioned in your communication above referred to.

CHANGING APPORTIONMENT OF RAILROAD SUBWAY COSTS

(No. 10146—*Board of Local Improvements*—W. V. S.—November 24, 1939—4 pp.)

The existence of a contract ordinance between a railroad company and the City that the City will bear the cost of constructing a subway under the railroad tracks does not preclude the City from applying to the Illinois Commerce Commission for an apportionment of the cost of the improvement different from that fixed by the contract ordinance.

Citations: *Chicago v. Commerce Commission*, 356 Ill. 501 (1934).
Commerce Commission v. E. St. L&C Ry. Co., 361 Ill. 606 (1935).

COST OF PAVING OVER SWITCH TRACKS

(No. 10066—*Board of Local Improvements*—J. J. M.—August 3, 1939—3 pp.)

The cost of paving the portion of Wrightwood avenue occupied by the switch track of the Standard Oil Company is, by ordinance, to be borne by the company and not the City.

When a person conveyed certain right-of-way to the City for the purpose of opening a street, the City must bear the cost of paving said street, notwithstanding that the grantor reserved in the deed the right to maintain and operate the two switch tracks servicing their adjacent property because the City subsequently contracted with the present owner to pave the street occupied by the tracks in question.

Citation: *Coun. J.* (1926-27), p. 4961 (1934), p. 4499.

PROTECTION OF RAILROAD STRUCTURES DURING SEWER WORK

(No. 10140—*Commissioner of Public Works*—C. B. C.—November 17, 1939—3½ pp.)

After proper notice of the City's intention to lay certain necessary sewers in streets crossed by railroad structures, it is the duty of said railroads to protect their structures at their own expense. If the railroads fail to do so, they cannot recover for damages sustained unless said damage is caused by the negligent or malicious conduct on the part of the City in doing said work. The fact that the sewers will be laid by WPA labor does not affect the question of duty or liability.

Citations: *Sears v. Chicago*, 247 Ill. 204 (1910).
City of Detroit v. Ft. Wayne & Elmwood Ry. Co., 90 Mich. 646, 51 NW 688 (1892).
Ohio & Miss. R.R. Co. v. McClelland, 25 Ill. 123 (1860).

Citations: (Cont.)

- CB&Q Ry. Co. v. Illinois, 200 US 561, 26 Sup. Ct. 341 (1906).
Columbus Gas, Light & Coke Co. v. City of Columbus, 50 Ohio
65, 19 LRA 510 (1893).
Anderson v. Fuller, 51 Fla. 380, 6 LRA (NS) 1026 (1906).
People v. Chicago City Ry. Co., 324 Ill. 618 (1926).

B. OTHER UTILITIES

DRIVEWAY PERMIT FEE FOR TELEPHONE COMPANY

(No. 9887—*Deputy Commissioner of Streets and Electricity—A. C.—*
September 16, 1938—4 pp.)

The contract ordinance between the City and the Illinois Bell Telephone Company merely restricts the City from imposing any license fees or permit fees upon the Illinois Bell Telephone Company for the construction and maintenance of its poles, wires, and other fixtures and equipment upon the public ways of the City, and does not relieve the Company from payment of permit fees for the erection and maintenance of driveways under the driveway ordinance of the City.

Citations:

Ordinances: Code '31: 857.

Coun. J. (1931-32), p. 709 (Illinois Bell Telephone Company franchise, secs. 1, 6, 10).

Cases: Bullman v. Chicago, 367 Ill. 217 (1937).

Miltimore v. Ferry, 171 Ill. 219 (1898).

OPINION OF FOREGOING SYNOPSIS

We have your letter of September 13, 1938 and the two warrants for collection attached thereto. You request our opinion as to whether or not said warrants should be cancelled.

The said warrants were issued to the Illinois Bell Telephone Company under Section 857 of the Revised Chicago Code of 1931, as amended, which provides, in part, as follows:

"For all driveways now or hereafter maintained at any place other than that used exclusively for charitable, education or residence purposes there shall be paid, in addition to the permit fee required by section 860-A, an annual permit fee for such maintenance, as follows:

"For the first sixteen feet in width or fraction thereof. . . . \$10.00

"For each additional sixteen feet in width or fraction thereof. \$ 1.00"

The Illinois Bell Telephone Company claims that under the terms of a contract ordinance passed on July 20, 1931 (Coun. J., p. 709), it is excused from paying the said warrants.

Section 1 of said contract ordinance grants permission to the Illinois Bell Telephone Company to construct and maintain upon, under and over the streets, alleys and other public ways of the city its lines of poles, anchors, wires, cables, conduits, vaults, laterals and other fixtures and equipment for the transmission of sound and signals by means of electricity.

Section 6 of said contract ordinance, in part, provides that the Illinois Bell Telephone Company will indemnify and save harmless the City of Chicago from any damages resulting from the erection of poles, the laying of conduits and the stringing, constructing and operating of cables, anchors, wires and electrical conductors, vaults, laterals, fixtures and equipment and the maintenance of said property.

Section 10 of said contract ordinance, in part, provides:

"The City shall not, by any general or special ordinance, impose any license or inspection fee or license or inspection tax or any regulation requiring the payment by the Company of any compensation to the City additional to that provided by Section 7 of this ordinance, and/or any ordinance now in force whereby the Company is required to and does make payment to the City of any license or inspection fee or license or inspection tax, or any payment in substitution of such license or inspection fee or license or inspection tax."

The fee prescribed by Section 857 of the Revised Chicago Code of 1931, as amended, is neither an inspection fee nor a license fee.

Under the rule of *ejusdem generis* the words "any regulation" contained in Section 10 of said contract ordinance would be construed to mean a regulation for the purpose of imposing a license or inspection fee. (*Bullman v. City of Chicago*, 367 Ill. 217.) Therefore, it cannot be said that the Illinois Bell Telephone Company is exempt under Section 10 of the contract ordinance.

It is well established that in construing a contract, the intention of the parties is to be determined from the terms of the contract itself. (*Miltimore v. Ferry*, 171 Ill. 219.) A complete reading of the contract ordinance under consideration indicates that it grants a franchise to operate a telephone system in the City of Chicago and permits the use of the streets and public ways for the erection and maintenance of poles, wires and other property. There is no specific mention of driveways. It can hardly be said, for example, that under Section 6 of said contract ordinance, it was intended that any damage or injury sustained as a result of the erection or maintenance of a driveway was to be covered. It is our opinion that the erection and maintenance of a driveway was not in the contemplation of the parties to the contract at the time the ordinance was passed by the City Council and later accepted by the Illinois Bell Telephone Company.

The many reservations and restrictions in the contract ordinance indicate that it was not the intention of the parties to substitute the payment provided for in this ordinance in place of all present and future obligations of the Illinois Bell Telephone Company.

For example, at the time the contract ordinance was passed there was a driveway ordinance in full force and effect. The Illinois Bell Telephone Company complied with the ordinance and gave the city its bond with good and sufficient surety. The contract ordinance did not purport to relieve the Illinois Bell Telephone Company of any obligation under any then existing ordinances or any ordinance to be passed in the future except as to any license fee or inspection fee for the maintenance of its poles, wires and other equipment on the streets, alleys and public ways. The contract ordinance in Section 10 reserves the right to license or tax telephone companies, to fix rates of service and to regulate the property of the telephone company as a public utility. It is our opinion that the contract ordinance merely restricts the city from imposing any license fees or permit fees upon the Illinois Bell Telephone Company for the construction and maintenance of its poles, wires and other fixtures and equipment upon the city streets, alleys and public ways.

We are therefore of the opinion that the warrants should not be cancelled.

The warrants for collection are returned herewith.

COMPENSATION FOR THE USE OF STREETS BY ALARM COMPANIES

(No. 10069—*City Comptroller—J. F. G.—August 4, 1939—4 pp.*)

Compensation for the use of streets for a public service may be exacted either by an ordinance in the nature of a license or franchise or by a general ordinance imposing a reasonable rental charge for the exclusive use of any part of a street.

On November 30, 1927, the City Council passed ten year ordinances authorizing certain alarm and watch service companies to maintain and operate a line of wires for the transmission of signals by electricity on public ways and requiring annual compensation for such privilege, but after the expiration of these ordinances, and without any other supporting ordinance, the City has no claim for compensation for such use of the public ways.

Citations:

Ordinances: Coun. J. (1927-28), pp. 1442, 1446, 1447.

Case: Springfield v. Postal Telegraph Co., 253 Ill. 346 (1912).

INSTALLATION OF PUBLIC UTILITY ELECTRICAL EQUIPMENT

(No. 9825—*Chairman, Committee on Utilities—J. F. G.—May 17, 1938—1½ pp.*)

The power to regulate the installation of electrical equipment of a public utility which is a part of the plant and facilities of the utility is vested in the Illinois Commerce Commission. The only power of the City Council to regulate the installation of electrical equipment is confined to such equipment which is installed upon private property which does not belong to the public utility.

Citations: Village of Atwood v. Cincinnati, Indianapolis and Western RR., 316 Ill. 425 (1925).

Northern Trust Co. v. Chicago Rys., 318 Ill. 402 (1925).

Chicago v. Chicago Great Western RR., 348 Ill. 193 (1932).

SECTION III

MANAGEMENT OF THE MUNICIPAL CORPORATION

CHAPTER XI

FINANCE

A. TAXES

LEGALITY OF TAX LEVIES AND ISSUANCE OF WARRANTS IN ANTICIPATION MUNICIPAL TUBERCULOSIS SANITARIUM

(No. 10050—City Comptroller—J. F. G.—July 13, 1939—4 pp.)

The State General Assembly has power to authorize and change the rates of taxation for the Tuberculosis Sanitarium. The amendments to the Tuberculosis Sanitarium act changing the tax rate need not be submitted to a vote of the people of Chicago.

Warrants issued in anticipation of the collection of taxes for the Tuberculosis Sanitarium Fund to the extent of 75% of the total amount levied for the years 1937, 1938 and 1939, are valid and legal obligations payable from the taxes against which the warrants were issued and not otherwise.

Citations:

Statutes: IRS '37, p. 3177, par. 2; p. 466, pars. 542, 543.

Other reference: 1939 Ill. Session Senate bill No. 596.

OPINION OF FOREGOING SYNOPSIS

In your letter of June 16, 1939 you request our opinion upon the legality of the tax levies for Municipal Tuberculosis Sanitarium purposes for the years 1937, 1938 and 1939 and of warrants issued in anticipation of said taxes to be collected.

On the application for judgment and sale of real estate for delinquent taxes for the year 1937 certain property owners objected to the levies of \$2,850,000 for the Tuberculosis Sanitarium Fund for the stated reason that the rate of taxation for such purposes was increased without a referendum.

As originally passed in 1908 the Act authorizing the establishment and maintenance of public tuberculosis sanitariums provided for the levy of a tax not to exceed four mills on the dollar annually upon condition that one hundred legal voters of the city shall present a petition to the city council asking that an annual tax be levied for such purpose and specifying in the petition the rate of taxation. The city council was then required to submit to a vote of the people the proposition for or against the tax for a public tuberculosis sanitarium and if a majority of all the votes cast should be for such tax the tax specified in the notice might be levied and collected.

In 1909, before an election was held for the establishment of the Municipal Tuberculosis Sanitarium in the city of Chicago, the enabling Act was amended with an emergency clause to make it effective from and after its passage changing the rate of taxation for the Tuberculosis Sanitarium Fund to a maximum of one mill on the dollar annually and changing the form

of the ballot by eliminating the specification of the rate of taxation. If a majority of all the votes cast upon the proposition were for the tax for a public tuberculosis sanitarium the city council could thereafter annually levy a tax of not to exceed one mill on the dollar for such purpose. An election was held on April 6, 1909 and a majority of all the votes was for the tax.

The enabling Act was thereafter amended from time to time decreasing and increasing the maximum rate of taxation for the Tuberculosis Sanitarium Fund. By Section 2 of the Tuberculosis Sanitarium Act as applied to the tax levies for the years 1937, 1938 and 1939 it is provided that "if the majority of all the votes cast upon the proposition is, that such city or village shall be 'For the tax for a public tuberculosis sanitarium,' the city council or board of trustees of such city or village shall thereafter annually levy a tax at not to exceed the respective rates and amounts prescribed in section 1, * * *." (Ill. Rev. Stat. 1937, p. 446, par. 543.) Section 1 of the same Act prescribes the maximum rates and amounts authorized to be levied by cities of more than 200,000 population at not to exceed seven-tenths of one mill on the dollar or at a rate that will produce when extended an amount not to exceed \$2,850,000, whichever is greater, for each of the years 1937 and 1938 and annually thereafter not to exceed seven-tenths of one mill on the dollar or at a rate that will produce when extended an amount not to exceed \$2,500,000, whichever is greater. (Ill. Rev. Stat. 1937, p. 466, par. 542.)

It was never considered that a referendum was necessary for any change in the tax rate and the question of changing the rate of taxation never was submitted to a vote of the people of Chicago. In our opinion, the General Assembly had power to and did by its various amendments authorize the rates of taxation from time to time established by amendments to the Tuberculosis Sanitarium Act without requiring such changes in the rates of taxation to be submitted to a vote of the people. The County Judge, however, has indicated that he will sustain the objection to the tax rate established for the year 1937, which was \$2,850,000. We are convinced that the County Court erred in this respect and that such decision will not be sustained by the Supreme Court. No final order on this objection has been entered and it is possible that the County Judge may change his ruling before final judgment is entered, especially if the Governor should allow to become a law Senate Bill No. 596 passed by the last General Assembly to validate all such taxes heretofore levied without a referendum.

Warrants issued in anticipation of the collection of taxes for the Tuberculosis Sanitarium Fund to the extent of seventy-five per cent of the total amount levied for the years 1937, 1938 and 1939, in our opinion, are valid and legal obligations payable from the taxes against which the warrants were issued and not otherwise. (Ill. Rev. Stat. 1937, p. 3177, par. 2.)

ISSUANCE OF 1938 TAX ANTICIPATION WARRANTS

(No. 9903—City Comptroller—J. F. G.—October 31, 1938—2½ pp.)

The City Comptroller may issue 1938 tax anticipation warrants for general corporate purposes to the full extent of 75% of the levy. The tax levy ordinance and the ordinance authorizing the issue and sale of tax anticipation warrants must be taken at their face value as the authority for the issuance and sale of tax anticipation warrants

until such time as there is a final adjudication by a court of competent jurisdiction declaring illegal the tax levy or any part of it.

Citations:

Statute: IRS '37, 146½: 2. ("An act to provide for the manner of issuing warrants, etc.," approved June 27, 1913, as amended, sec. 2.)

Ordinances: Coun. J. (1937-38), p. 5315 (tax levy ordinance), p. 5400 (tax anticipation warrants ordinance).

COLLECTION OF FIRE DEPARTMENT TAX ON MARINE POLICIES

(No. 9781—City Comptroller—M. H. F.—February 19, 1938—3½ pp.)

There is nothing in the present State insurance laws to authorize the City to impose the 2% Fire Department tax upon marine insurance of foreign fire insurance companies as long as the premiums for fire insurance collected on marine policies are not separately specified.

Citations:

Statutes: IRS '37, 24: 669, 73: 1027.

Other reference: 19 Op. Corp. Coun. 342 (No. 9182).

OPINION OF FOREGOING SYNOPSIS

We have your letter of recent date requesting our opinion as to whether the changes made by the legislature in the Illinois Insurance Code and related acts subject Lloyd's, reciprocal or interinsurance exchanges of other states and the marine writings of foreign fire insurance companies to the 2% fire department tax.

The source of power to impose this tax is found in an act entitled "An Act to enable cities, towns and villages, organized under any general or special law, to levy and collect a tax or license fee from foreign fire insurance companies for the benefit of organized fire departments," filed May 31, 1895, paragraph 669, Illinois Revised Statutes, 1937. Section 1 of this Act reads in part as follows:

"All corporations, companies and associations not incorporated under the laws of this State, and which are engaged in any city, town or village organized under any general or special law of this State, in effecting fire insurance, shall pay to the treasurer of the city, town or village for the maintenance, use and benefit of the fire department thereof, a sum not exceeding two per cent of the gross receipts received by their agency in such city, town or village; * * *

This section was amended at the 1937 session of the legislature by incorporating a provision authorizing the City Comptroller to examine the books, records and other papers and documents of the agent, corporation, company or association, for the purpose of verifying the correctness of the report of the amounts received for fire insurance. At the same session of the legislature that body repealed the entire Insurance Act or series of acts comprising the chapter on insurance and enacted a complete new insurance code.

In relation to the State insurance laws as they existed prior to the amendment made at the 1937 session of the legislature, this department advised you in an opinion rendered May 25, 1936 (Opinions of the Corporation

Counsel, 1936 Supplement, page 93) that groups operating as interinsurance exchanges were not subject to the payment of the 2% fire department tax to the City of Chicago on fire insurance premiums collected on properties located within the city. In the same opinion we expressed the view that such 2% fire department tax could not be collected on premiums of marine policies unless the premiums for fire insurance could be separately specified.

In Section 415 of the new Insurance Code (paragraph 1027, chapter 73, Illinois Revised Statutes, 1937) the tax authorized by the act of May 31, 1895, above quoted, is expressly reserved to the municipalities therein designated and such power is in no way enlarged.

Because the power to impose the tax is found in the hereinbefore quoted section of the act of May 31, 1895, our opinion is that the passage of the new Insurance Code has not affected the taxing power of the city so as to give it the right to impose the 2% tax upon Lloyd's, reciprocal or interinsurance exchanges. Under the statutes prior to amendment the exemption of these groups from the fire department tax was made on the ground that they were not corporations, companies or associations within the meaning of these terms as used in the Act imposing the tax.

The exemption of marine policies from the tax was based on the fact that such insurance carries no particular rate for fire protection alone and that there was no separation of the fire coverage from the total premiums paid. If the fact still remains that the premiums for fire insurance collected on marine policies cannot be separately specified, we find nothing in the present State insurance laws which indicates that the tax can be collected on premiums of marine insurance.

PAYMENT OF TAXES ON CONDEMNED PROPERTY

(No. 9821—*Supervisor of Condemnation Awards—A. A. S.—May 12, 1938—1½ pp.*)

A property owner is required to pay taxes on property sought to be condemned under the Local Improvements act up to the date of the judgment in the condemnation proceedings. After the date of judgment, the property owner is relieved from the payment of taxes on the property, and the taxes should not be deducted from his award.

Citation: *People ex rel. Carofiglio v. Gill*, 291 Ill. App. 143 (1937).

CONVEYANCE IN CONSIDERATION OF TAX RELEASE

(No. 9937—*City Comptroller—J. F. G.—December 28, 1938—3 pp.*)

The City may not accept title to certain real estate which is located in the City and in Blue Island, and which the owner thereof would convey to the City in return for a release of accumulated real estate taxes and special assessments, as the City may not acquire real estate merely to protect its interest in general taxes and special assessments accumulated thereon.

A deed attempting to convey property to the City, which was recorded without the knowledge of the City authorities and, after being recorded, was delivered by the recorder to the grantor, is not effective

to convey title to the City. The executing and recording of a deed without the knowledge of the grantee does not constitute a delivery of the property to the grantor.

Where all the property named in a deed is offered to the City in consideration of a release of accumulated taxes, the City may not accept the deed in part and reject it in part. An offer must be accepted or rejected as tendered.

Citations: *Kingsbury v. Burnside et al.*, 58 Ill. 310 (1871).
Steinke v. Sztanka, 364 Ill. 334 (1936).
City of Champaign v. Harmon, 98 Ill. 491 (1881).

EXECUTION OF CERTAIN QUITCLAIM DEEDS

(No. 9832—*City Comptroller*—A. A. S.—May 24, 1938—2 pp.)

By stipulations in certain condemnation suits, it was agreed that upon the payment of a sum sufficient to reimburse the City for tax deeds acquired by it, the City would convey by quitclaim deed all its right, title, and interest under the tax deeds. However, the quitclaim deeds should not include any assignment of the claim arising out of the tax title interests conveyed against the condemnation award, and should include only the interest acquired by the City by virtue of the tax deeds for which the City has been reimbursed.

COLLECTION OF DELINQUENT FIRE DEPARTMENT TAX

(No. 9872—*Chairman, Committee on Finance*—N. N. E.—August 13, 1938—3½ pp.)

The City Council can legally enter into a contract for the collection of delinquent 2% Fire Department taxes, but no part of the proceeds of the 2% Fire Department tax may be used to pay for such services. If the services so contracted for are to be paid from the corporate purposes fund, there must have been some provision made for such payment in the annual appropriation ordinance before any contract is made or expense incurred by the City.

Citations:

Statute: IRS '37, 24: 104, 669.

Ordinance: Code '31: 3439.

Cases: *Melluish v. City of Alton*, 230 Ill. App. 255 (1923).
Empire Voting Machine Co. v. Chicago, 267 F. 162 (1920).
People ex rel. City of Chicago v. Commercial Union Fire Insurance Co., 322 Ill. 326 (1926).
Litz v. Village of West Hammond, 230 Ill. 310 (1907).

Opinion No. 10103 of September 20, 1939, to the Committee on Finance holds substantially the same as the above opinion.

B. MANAGEMENT OF CITY FUNDS

PAYMENT OF RELOCATION OF RAILROAD TRACKS AT MUNICIPAL AIRPORT

(No. 9847—J. F. G.—June 21, 1938—3½ pp.)

The appropriation in the City's annual appropriation bill for 1938 "for expenses in connection with the development of the Municipal Airport" is valid and sufficient to pay all expenses incidental to the removal and relocation of the tracks of the Chicago and Western Indiana Railroad.

An appropriation for the purpose of a Municipal Airport is for a public and corporate purpose, and is within the powers granted to the City by the General Assembly.

The appropriation includes the expense of relocating the railroad even though the railroad may not have had the power to relocate until after the appropriation bill was passed. The appropriation depends upon the power of the City to develop the Municipal Airport and not upon the power of the railroad to condemn property for a new right of way.

An appropriation need not specify in detail each particular item for which the amount appropriated is to be expended. It is sufficient if the object and purpose of the appropriation is specified in general terms with a single object in view, in this instance the development of the Municipal Airport.

Citations:

- Statute: Cities and Villages act, art. I, sec. 10, art. V, sec. 100.
Cases: Hesse v. Rath, 224 NY App. Div. 344 (1928), affirmed, 249 NY 436.
Dysart v. City of St. Louis, 321 Mo. 514 (1928), 11 SW (2d) 1045, 62 ALR 762.
McClintock v. City of Roseburg, 127 Ore. 273 (1929).
City of Wichita v. Clapp, 125 Kan. 100 (1928).
Wentz v. City of Philadelphia, 301 Pa. St. 261 (1930).
People v. Chicago, 363 Ill. 409 (1936).
People v. Irvin, 325 Ill. 497 (1927).
People v. Millard, 307 Ill. 556 (1923).
People v. Chicago, Burlington and Quincy RR., 306 Ill. 529 (1923).
People v. Eastern Illinois and Missouri RR., 335 Ill. 245 (1929).
Tribune Co. v. Thompson, 342 Ill. 503 (1930).

OPINION OF FOREGOING SYNOPSIS

At your request we have examined into the question of the sufficiency of the appropriation included in the annual appropriation bill of the City of Chicago passed January 12, 1938 to pay all expenses incidental to the removal of the tracks of Chicago and Western Indiana Railroad Company and the relocation of the railway.

The appropriation reads as follows (Council Journal page 5213):

	Amount Appropriated
"For expense in connection with the development of the Municipal Airport. No part of this appropriation shall be expended except upon further order of the City Council....."	
84-S-63	\$ 800,000.00"

(1) The appropriation for the purpose of a Municipal Airport is a public and corporate purpose (*Hesse v. Rath* (1928), 224 N. Y. App. Div. 344, affirmed 249 N. Y. 436; *Dysart v. City of St. Louis* (1928), 321 Mo. 514; 11 S. W. (2d), 1045, 62 A. L. R. 762; *McClintock v. City of Roseburg* (1929), 127 Ore. 273; *City of Wichita v. Clapp* (1928), 125 Kan. 100; *Wentz v. Philadelphia, et al.* (1930), 301 Pa. St. 261).

(2) By virtue of Article V, Section 100, of the Cities and Villages Act the City of Chicago at the time of the passage of the annual appropriation bill had power "To establish and maintain airports either within or without the corporate limits of the city * * *." It had express power also to "contract and be contracted with, acquire and hold real and personal property for corporate purposes, * * *." (Section 10, Article I, Cities and Villages Act.); also "To appropriate money for corporate purposes only, and provide for payment of debts and expenses of the corporation." (Section 2, Article V, Cities and Villages Act.)

It seems obvious that any appropriation relating to the establishment and maintenance of an airport is valid. This is especially true of the instant appropriation which, it will be noted, is "For expense in connection with the development of the Municipal Airport." The development of a municipal airport is a necessary incident to the establishment and maintenance of an airport.

In *The People v. City of Chicago* (1936), 363 Ill. 409, it was held that under the power to establish parks and playgrounds the city had power to operate a nursery outside the city limits to supply the city's park needs.

(3) The appropriation, although limited to a single purpose as required by law, is sufficiently comprehensive to permit the city to obligate itself for the payment of any expense to accomplish the expressed object: "the development of the Municipal Airport." This includes expense of relocation of the railway even though the railroad may not have had power to relocate until after the appropriation bill was passed. The validity of the appropriation does not depend upon the extent of the power of the railroad to condemn property for a new right of way. It depends upon the power of the city to develop the Municipal Airport. Without the recent legislation enabling the railroad to relocate its railway, the city could have purchased a new right of way for the railroad in exchange for the right of way necessary for the development of the Municipal Airport.

An appropriation need not specify in detail each particular item for which the amount appropriated is to be expended. It is sufficient if the object and purpose of the appropriation is specified in general terms with a single object in view, in this case, the development of the airport (*The People v. Irvin* (1927), 325 Ill. 497; *The People v. Millard* (1923), 307 Ill. 556).

In *The People v. C. B. & Q. R. R. Co.* (1923), 306 Ill. 529, it was held there was no valid objection to levying a single sum for several purposes which are embraced within some general designation giving the necessary information to the taxpayer and a county tax item designated as "coal and gas fund" was equivalent to an item for heat and light and need not state separately the amounts for coal and gas.

A single appropriate general purpose is sufficient to include every ex-

penditure required for that purpose though there may be many items (*The People v. E. I. & M. R. R. Co.* (1929), 335 Ill. 245, 246).

(4) Even if the power of the city to enter into any obligation and pay the expense of the relocation of the railway were not implied in the power to establish and maintain airports, the recent legislation giving the city express power to enter into such obligations and pay such expenses certainly authorizes the expenditure of any money involved from the appropriation "in connection with the development of the Municipal Airport." Prior to this legislation the only criticism that could be leveled against an expenditure incident to the relocation of the railway would be that the city had not the power to develop the Municipal Airport in the particular manner now authorized, i. e., the removal of the railroad tracks and their relocation elsewhere. With power to relocate the railway authority to expend money previously appropriated for the development of the Municipal Airport was expressly given for the development of the airport by means of the relocation of the railway.

(5) The limitation in the appropriation that no part thereof shall be expended except upon further order of the City Council is merely to give the City Council supervision of the expenditures [*Tribune Co. v. Thompson* (1930), 342 Ill. 503, 527-528].

We have given to you what, in our opinion, is a resume of the principles of law applicable to every possible claim which may be made against the expenditure of city funds under the proposed contract ordinance with the railroads. As we view the matter, we are unable to find any objection which deserves serious consideration.

You have asked for a copy of the resolution passed by the Board of Education and a copy of the ordinance passed by the City Council as preliminary steps recited in the inducements of the proposed contract ordinance, copy of which we have submitted to you for approval. A copy of the resolution passed by the Board of Education is incorporated in the ordinance passed by the City Council yesterday. We have no extra copies available at this time for your examination. The ordinance was approved by the Mayor and will be incorporated in the Journal of the Proceedings of the City Council which will be in printed form by Thursday of this week. As soon as we receive a copy of the Journal we will send same to you by messenger marked to indicate the place where the ordinance referred to may be found.

The writer has made arrangements for his vacation beginning July 1 and will not be available for conferences until August 1. We therefore trust that you will speed action on the proposed ordinance and, if necessary, conferences should be arranged so that the ordinance in its final form will be ready for submission to the City Council not later than June 30.

USE OF TRACTION FUND FOR SUBWAY EXPENSES

(No. 9991—R. N.—April 26, 1939—2 pp.)

The City may use the traction fund to defray the cost of construction of a subway, or such portion of such cost as may not be raised by special assessment.

Citations:

Statute: "An act to authorize cities, villages and incorporated towns to construct * * * subways and tunnels, etc.," sec. 4.

Ordinance: Subway Ordinance, sec. 7.

Case: *Barsaloux v. Chicago*, 245 Ill. 598 (1910).

OPINION OF FOREGOING SYNOPSIS

You ask certain questions in regard to the use of the traction fund for purposes other than those specified in the traction ordinance. We assume that your inquiry is directed toward the use of the traction fund for subway purposes.

Section 4 of "An Act to authorize cities, villages and incorporated towns to construct or otherwise acquire subways and tunnels and to operate or lease the same and to provide the means for such construction, requisition or operation" provides:

"In order to defray the cost of such subways, or such portion of such cost as may not be raised by special assessment, the city * * * may use any available funds belonging to the city, including any special fund or funds accumulated from monies received by the city from street railroad companies and accretions of interest thereon * * *."

Such use of the traction fund has been held a legal use thereof by the Supreme Court of Illinois in the case of *James G. Barsaloux v. City of Chicago*, 245 Ill. 598 (1910).

Section 7 of the subway ordinance provides:

"The city council shall not grant any lease of, or consent, permit, or right to use said subways or any part thereof for local transportation purposes except by the passage of an ordinance which shall not become operative or effective, however, until a proposition to approve such ordinance shall have been submitted to the electors of the city of Chicago at some general or municipal or special election and shall have been approved by a majority of the electors voting upon the proposition. Provided, however, if and when the city of Chicago by ordinance shall have granted a permit to construct and operate or maintain and operate a local transportation system including the use of city owned subways and such ordinance shall have been submitted to and approved on a referendum, it shall not be necessary to pass or to submit to a referendum a separate ordinance granting a lease of or consent, permission, or right for such use of said subways or any part thereof."

We trust that this answers your inquiry.

USE OF WHEEL TAX FUNDS FOR PAVING UNIMPROVED STREETS

(No. 9786—Alderman, 41st Ward—A. F. G.—February 25, 1938—
3½ pp.)

The annual appropriation bill for 1938 does not permit the use of wheel tax funds for paving unimproved streets, and that appropriation bill, having been passed, can no longer be amended.

Citations:

Statutes: Cities and Villages act, art. V, sec. 95, art. VII, sec. 2a.

Ordinance: Coun. J. (1937-38), p. 5248 (Annual appropriation bill for 1938).

PURCHASE OF LAKE-TO-GULF RIGHT OF WAY

(No. 9894—Commissioner of Public Works—J. F. G.—October 1, 1938—
—3½ pp.)

The Department of Public Works may issue vouchers for the purchase of a right of way within the City in connection with the Lake-

to-Gulf waterway out of the appropriation account authorizing the expenditure of money for this purpose. The City Council has power to provide by appropriation for the securing of such a right-of-way, as it is for a purpose properly under the jurisdiction of the City.

Citations:

Statute: IRS '37, 24: 65.29.

Cases: Griffin v. County of Cook, 369 Ill. 380 (1938).

People ex rel. Illinois Armory Board v. Kelly, 369 Ill. 280 (1938).

RESTORATION OF ACCOUNT TO PAY CLAIM AGAINST IT

(No. 9817—City Comptroller—J. F. G.—April 30, 1938—1½ pp.)

The City Council was not authorized to transfer an unexpended balance of the proceeds of a bond issue when there was a claim pending against those proceeds. The City Comptroller, therefore, may readjust the City's accounts so as to restore so much of the unexpended balance as may be necessary to pay the claim.

Citation: IRS '37, 24: 677m.

CREDITOR'S BILL AGAINST THE CITY

(No. 9770—City Comptroller—W. V. S.—February 8, 1938—1½ pp.)

A creditor's bill may not lie against the City to recover money held by the City due to the debtor of the claimant.

Citations: Lamb v. Lamb, 256 Ill. App. 226 (1930).

Addyston Pipe and Steel Co. v. Chicago, 170 Ill. 580 (1897).

Merwin v. Chicago, 45 Ill. 133 (1869).

LIEN AGAINST MONEY DUE GARBAGE CONTRACTOR

(No. 9778—City Comptroller—J. F. G.—February 17, 1938—1½ pp.)

A contract between a person and the City to dispose of garbage is not a contract for a public improvement, and thus notices of claims for liens against money due from the City to the person under the contract are ineffective. A lien against public funds is allowed by statute only for material, apparatus, fixtures, machinery, or labor furnished to any contractor having a contract for a public improvement for any city in the State.

Citation: IRS '39, 24: 23.

WAIVER OF DECEASED ATTORNEY'S LIEN

(No. 10087—City Comptroller—A. J. R.—August 25, 1939—2 pp.)

The City Comptroller should not pay a claim purportedly subject to an attorney's lien when one of the attorneys allegedly entitled to

the lien died before a waiver of lien was signed. If there is a valid lien, the administrator of the lienor's estate alone can release it upon authority from the Probate Court.

C. JUDGMENTS AND CLAIMS

PAYMENT OF JUDGMENTS

(No. 9883—City Comptroller—J. H. S.—September 13, 1938—2 pp.)

A judgment payable out of the Judgment Tax fund should be paid in its entirety from the fund even though it includes interest accruing subsequent to January 1, 1935. The controlling element is whether the debt itself was liquidated. The interest should be considered merely as an incident to that debt.

A liquidated debt, within the meaning of the Judgment Tax act, is a debt which is fixed as to amount either by agreement of the parties or by operation of law, and is capable of being ascertained by arithmetical computation.

Citations:

Statute: IRS '37, 24: 697a (Judgment Tax act, sec. 1).

Cases: Williams and Davis v. Davis, 105 NJL 542, 147 Atl. 337 (1929).
Harrington Lumber Co. v. Smith, 44 Tex. Civ. App. 363, 99 SW 110 (1906).
Clark v. Dutton, 69 Ill. 521 (1873).
Duncan Lumber Co. v. Leonard Lumber Co., 332 Ill. 104 (1929).
Kraft v. Grider, 221 Ill. App. 467 (1921).
Robinson v. Hibbs, 48 Ill. 408 (1868).

USE OF TAX FUND

(No. 9997—City Comptroller—C. H. L.—May 4, 1939—2 pp.)

A final judgment against the City for a liquidated debt contracted prior to January 1, 1935, is properly chargeable to the Judgment Tax fund.

Citation: IRS '37, 24: 697a.

PAYMENT OF INTEREST ON CONDEMNATION JUDGMENTS

(No. 9869—City Comptroller—J. F. G.—August 5, 1938—2½ pp.)

Assuming the regularity of payment of interest, all interest on unpaid condemnation judgments entered prior to January 1, 1935, may be paid, together with the principal of the judgment, from the Judgment Tax fund, and all judgments for interest only may be paid

out of the Judgment Tax fund, if the principal of the condemnation judgment has been paid prior to January 1, 1935. Such judgments for interest are judgments for a liquidated debt due and payable prior to the first day of January, 1935.

Claims for interest alone not reduced to judgment, which are paid as directed by the Department of Law, must be considered as a general liability and paid from the corporate fund.

Citations:

Statute: IRS '37, 24: 697a.

Cases: Turk v. Chicago, 352 Ill. 171 (1933).

People ex rel. Wieboldt Stores, Inc. v. Chicago, 368 Ill. 421 (1938).

Blaine v. Chicago, 366 Ill. 341 (1937).

The following opinions hold substantially the same as the above opinion: Opinion No. 10151 of November 28, 1939 to The City Comptroller. Opinion No. 10152 of November 28, 1939 to The Board of Local Improvements.

ASSIGNMENT OF JUDGMENTS

(No. 10053—City Comptroller—J. F. G.—July 17, 1939—2 pp.)

A transcript of a judgment upon which is endorsed a waiver of appeal or a certificate of finality by the Corporation Counsel is not a negotiable instrument and there can be no guarantee by any officer of the City of payment to the holder of an assignment as against conflicting claims of undisclosed prior assignees.

The City can be compelled to pay a judgment rendered against the City to the judgment creditor or his rightful assignee upon receipt of a proper satisfaction piece.

Citations: 18 Op. Corp. Coun. 766 (No. 8035).

19 Op. Corp. Coun. 362 (No. 9408).

LIABILITY OF CITY TO ASSIGNEE OF JUDGMENT WHO DID NOT PRESENT TRANSCRIPT

(No. 9762—City Comptroller—M. A. G.—January 22, 1938—2½ pp.)

When the City has paid a judgment to a firm which presented the usual transcript of judgment and an assignment of the judgment, the City is not liable in any amount to another assignee of the judgment by an assignment of a later date when that assignee did not present to the City a transcript of the judgment and an assignment of the judgment.

PRODUCTION OF COPY OF LETTER ON CLAIM

(No. 9965—Hon. Oscar Hewitt—W. F. S.—March 15, 1939—2 pp.)

Since the City could be compelled to produce a letter written about a controverted claim by appropriate judicial process, it is not improper for the City official who had written this letter to forward a copy to one of the interested parties.

LIABILITY FOR DAMAGE BY BOARD OF HEALTH

(No. 9797—President, Board of Health—C. N.—March 16, 1938—3 pp.)

In driving city-owned motor vehicles, such as milk sampling cars, supply trucks and ambulances, employees of the Board of Health are performing a public or governmental service, and the City would not be liable for any personal injury or property damage caused by those vehicles. Whether the driver could be held personally responsible would depend entirely upon the personal element as reflected in the proximate cause of the accident.

Citations:

Statute: IRS '37, 24: 65.1.

Cases: *Roumbos v. Chicago*, 332 Ill. 70 (1928).

People v. Chicago, 256 Ill. 558 (1912).

Gebhardt v. Village of La Grange, 354 Ill. 234 (1933).

Miralago Corp. v. Village of Kenilworth, 290 Ill. App. 230 (1937).

Other reference: McQuillin, *Municipal Corporation*, 2nd ed., vol. 3, sec. 1270.

OPINION OF FOREGOING SYNOPSIS

We have your letter of March 11, 1938 in which you say that a number of employees of the Board of Health are assigned to drive City-owned vehicles, such as milk sampling cars, supply trucks and ambulances, and ask

"Should any of the City-owned vehicles be involved in an accident at any time, would the city of Chicago be liable for any personal injury or property damage caused or would the individual operator of the vehicle be held liable?"

The rule is firmly established in our law that where the municipal corporation is performing a duty imposed upon it as the agent of the State in the exercise of strictly governmental functions, there is no liability to private action on account of injuries resulting from the wrongful acts or negligence of its officers or agents unless made liable by statute.

Our Supreme Court of Illinois has frequently differentiated between the public or governmental and private or corporate municipal functions in a long line of cases, including:

Roumbos v. City of Chicago, 332 Ill. 70 (1928),

The People v. City of Chicago, 256 Ill. 558 (1912),

Gebhardt v. Village of LaGrange Park, 354 Ill. 234 (1933),

Miralago Corp. v. Village of Kenilworth, 290 Ill. App. 230 (1937).

It is clear that in driving City-owned motor vehicles, such as milk sampling cars, supply trucks and ambulances, employees of the Health Department are performing a public or governmental service and that if the vehicles they drive are involved in accidents, the City of Chicago would not be liable for any personal injury or property damage caused. As to whether the driver of such a motor vehicle could be held personally responsible would depend entirely upon the personal element as reflected in the proximate cause of the accident. Numerous situations could be conceived of wherein such personal liability would be present, even though the City of Chicago would not be liable.

You also ask if disciplinary action may be taken against the driver of one of the vehicles described who refuses to operate such a City-owned vehicle unless insurance is provided for him by the City. Section 2 of Article V of the Cities and Villages act (p. 347, Ill. Rev. Stats. 1937) gives the City Council power to appropriate money for corporate purposes only.

McQuillin, Municipal Corporations, Second Edition, Vol. 3, Sec. 1270, P. 812, says:

"Contracts which are not for the benefit of the municipality are invalid * * * thus a contract employing a stenographer in an action in which the municipal corporation is not a party and in which it could under no circumstances be held liable is void. *City of Chicago v. George H. Williams*, 182 Ill. 135 (1899) * * * So a municipality cannot contract to indemnify an officer for loss resulting from the performance of his duties. *Vaughtmann v. Town of Waterloo*, 43 N. E. 476 (1896)."

Since the City Council apparently has no power to provide indemnity of the kind described for the driver, in an instance of refusal on the part of such an employee to work without indemnity, there would appear to be no alternative but to discharge such a recalcitrant employee.

DAMAGE TO PERSONAL PROPERTY IN POLLING PLACE

(No. 9989—Chairman, Committee on Finance—C. N.—April 19, 1939—7 pp.)

The conduct of an election is in the nature of a governmental service and hence the municipality conducting an election is not liable for damage to personal property caused by the negligence of individuals assigned to the performance of specific duties in connection with the election.

DAMAGE SUSTAINED WHEN THEATER CLOSED

(No. 9963—Chairman, Committee on Finance—C. P. H.—March 9, 1939—3 pp.)

The City is not liable for damages which a theater owner may have sustained by having to refund admission receipts to patrons when police closed his theater because permits necessary to exhibit the picture were not posted, as in so acting the City was performing a governmental function.

Citations: *Johnston v. Chicago*, 258 Ill. 494 (1913).
Chicago v. Williams, 182 Ill. 135 (1899).
Culver v. City of Streator, 130 Ill. 238 (1889).
Wilcox v. Chicago, 107 Ill. 334 (1883).

DAMAGES TO UTILITY CONDUITS BY WPA WORKERS

(No. 10040—Chairman, Committee on Finance—C. N.—June 23, 1939
—7 pp.)

The City is liable for damages to utility conduits and cables in City streets occasioned by the negligence of WPA workers rounding curbs under the direction of the Bureau of Street Engineers.

OPINION OF FOREGOING SYNOPSIS

The above file consisting of ten separate claims by Commonwealth Edison Company for damage to the utility's conduits and cables at various locations, has been referred to us for an opinion as to the city's liability.

In each instance in a letter enclosing itemized bills, the utility's Superintendent Accident Liability Department expresses the belief that the city is responsible for the damage sustained, for failure to determine that Commonwealth Edison Company's conduits were located at the points described. Mr. Lincoln E. Griffith, Engineer for the Bureau of Streets, explains that most of the operations referred to were part of a WPA curb rounding project by WPA workers under city supervision. He shows that Commonwealth Edison Company had a representative at a meeting held in Garfield Park in December, 1935, at which the method of operation for the proposed project was fully discussed. He states that it was the duty of Commonwealth Edison Company to place inspectors in the various locations covered by the project, for the purpose of warning city workers and WPA laborers of the presence of the utility's conduits and cables. Mr. Griffith further asserts the Bureau of Streets acted in the capacity of an owner exercising only general supervision and that the WPA directed all construction operations, furnished all labor and materials and acted in the capacity of an independent contractor and gives it as his opinion that any damages which may have occurred in connection with construction operations are the responsibility of the WPA.

We are in accord with Mr. Griffith's remarks concerning notice to Commonwealth Edison Company, but the presence or absence of Commonwealth Edison Company's inspectors is not the controlling factor in fixing liability. As to liability on the part of the WPA, we believe that inasmuch as the curb rounding project was for the benefit of all users of Chicago's streets and sidewalks, the construction being under the direction of Bureau of Street's Engineers, liability for damage to utility property during the progress of construction lies with the City of Chicago, not the WPA.

The file reveals the following pertinent facts concerning the various claims:

(1) Northwest corner of 24th and Troy streets, WPA Project No. 780, working on sewers and catch basins, damage claimed as of March 18, 1937, amount \$73.24. The record reveals that WPA completed its operations on the northwest corner of this intersection on March 11, 1937; northwest corner on March 8, 1937 and southwest corner on March 12, 1937. Although the Bureau of Streets claims it has no record or report of any accident, there is reason to believe that in entering into sewer and catch basin work of the magnitude indicated, the engineers and foreman in charge of operations for the city should have warned their men of the presence of utility's conduits and cables. Since it appears that the damage to the utility property was caused by the carelessness of workers in this instance, we are of the opinion that this claim should be allowed.

(2) Loomis street and 15th place, WPA project under city supervision, repairing curb, September 27, 1937, amount claimed \$574.79. Owing to the

dearth of details as to what occurred, no report having been made of any damage done to utility property and no city departmental record casting any light on what is alleged to have occurred, we are in no position to decide whether or not the city is liable.

(3) Western avenue at 108th street, October 26, 1937, amount \$81.84, WPA Project No. 2782, breaking pavement for building Mount Greenwood $4\frac{1}{2}$ foot sewer. It is indicated that in using an air tool, a laborer employed it in such a way that it went through the utility duct. An inspector for Commonwealth Edison Company was on the job. We are of the opinion that inasmuch as damage was directly due to the action of the laborer, the City of Chicago in this instance is responsible for the damage to Commonwealth Edison Company property.

(4) East side of Dorchester avenue, southwest corner of 60th street, WPA Project No. 2259 amount \$346.08, engaged in building or repairing a manhole. A laborer drove a crowbar into cable of Commonwealth Edison Company. The record reveals that this was a Chicago Park District project. We are of the opinion, therefore, that the City of Chicago is not liable for the damage claimed.

(5) West side of Magnolia avenue, north of alley, north of Early avenue, \$124.04, March 30, 1937. City and WPA workmen on Project No. 3699 were installing new curbing. A gas company inspector on the job warned the men of the presence of a Commonwealth Edison Company conduit. Despite this warning, a workman's tool damaged conduit and cable of Commonwealth Edison Company. We are of the opinion that the City of Chicago in this instance is liable for the damage to utility property.

(6) East side of St. Louis avenue on north side of 21st street, November 28, 1936, \$573.52, part of WPA Project 780 rounding curbs. The record reveals that the northeast corner was rounded on November 4, 1938, while the old curbing was removed, a laborer damaged conduit and cable of Commonwealth Edison Company. We are of the opinion that in this instance the negligence of the laborer caused the damage to the utility property and that the City of Chicago is liable for such damage.

(7) South side of 45th street at west side of Wallace street, August 18, 1936, \$157.53, part of WPA Project 780, repairing curb. For the reasons given in the last cited claim, we are of the opinion that the City of Chicago is liable for the damage to Commonwealth Edison Company property.

(8) South side of Harrison street, 18 feet west of center line of manhole on west side of Campbell avenue, \$671.43, June 12, 1936. Departmental records reveal that WPA workers and city workers were on project repairing curb on the day preceding that given for the accident. For the reason given in considering the above claims, we are of the opinion that the City of Chicago in this instance is liable for the damage to Commonwealth Edison Company property.

(9) Southwest corner of 59th street and Perry avenue, \$181.55, March 26, 1938, William Cummings, Water Pipe Extension Division plumber in charge of operations, reports that on March 25, 1938, while excavating to cut off an abandoned service at Wentworth avenue, one of the laborers struck a conduit a glancing blow with a pick, causing a very slight scratch to same. The Edison Company had its repair crew solder the scratch on March 25, 1938. At no time was the conduit pierced or any damage done to the line therein. Because of the wide variance between the plumber's report and the extent of claim presented by Commonwealth Edison Company, we are of the opinion that this claim should be denied.

(10) North side of 69th street, curb line east of Indiana avenue, \$443.48, March 24, 1936, WPA Project 780 rounding curbs. Northwest corner March

31, 1936; southwest corner March 31, 1938, northeast corner April 1, 1936 and southeast corner April 1, 1936. Laborer struck conduit and cable of Commonwealth Edison Company with tool, injuring the same. The Bureau of Streets has a report of this accident and it appears that carelessness on the part of a laborer was responsible. We are of the opinion, therefore, that this claim should be allowed.

In all instances where we are of the opinion that the City of Chicago is liable and the claim should be allowed, we are of course not in a position to determine the reasonableness of the amount claimed.

We return your file herewith.

RECOVERY FOR INJURY BY DEFECT

(No. 9820—*Alderman, 45th Ward—C. N.—May 5, 1938—2½ pp.*)

It is the duty of the City to keep its streets and sidewalks in a reasonably safe condition. However, the City is not an insurer against accidents, and the fact that a person sustained injuries on a sidewalk does not necessarily mean that the City is liable.

Before a claimant may recover from the City, he must show that the defective and dangerous condition of the sidewalk was the proximate cause of the injuries sustained by him and that he was not guilty of contributory negligence. The mere existence of a sidewalk defect is not in itself evidence of negligence. There must be evidence that the City had knowledge of the defect or that the defect existed for such a length of time that the City should have known of its existence.

Citations:

Cases: *Job v. City of Alton*, 189 Ill. 256 (1901).

Storrs v. Chicago, 208 Ill. 364 (1904).

Other reference: McQuillin, *Municipal Corporations*, 2nd ed., v. 5, sec. 1971.

LIABILITY OF CITY FOR INJURY BY BUILDING ACCEPTED FOR DEMOLITION

(No. 9848—*Engineer in Charge of Demolition, Department of Public Works—A. F. G.—June 22, 1938—3½ pp.*)

When the City accepts a building for the purpose of demolition, it assumes such ownership and control of the building as to render it liable for negligence in the management and operation of the building. It would not be liable for injuries suffered by a mere trespasser, although under certain circumstances it might be liable for injuries to a child of tender years who might trespass on the property.

Citations:

Cases: *Williams v. Chicago and Alton RR.*, 135 Ill. 491 (1891).

City of Pekin v. McMahon, 154 Ill. 141 (1895).

Burke v. McDermott, 256 Ill. 401 (1912).

Other references: *Thompson, Negligence* v. 1, p. 303.
43 CJ 1163.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge your letter of June 10, 1938 asking to be advised of the responsibility of the city in certain cases where the city has taken over private buildings for the purpose of demolition.

You state that it is not always possible to begin wrecking operations immediately upon the signing of "Consent Agreements." You say:

"During this period of time the building may be unguarded and unprotected. Owners consider themselves no longer responsible for existing conditions as buildings have been duly turned over to the City of Chicago.

"What is the City's responsibility during this period as to—

"Public hazard (Public Liability) ?
Health hazard ?

"Take, for a supposititious case:—

"Suppose building is open (not boarded up), and a small child wanders into it and falls through a hole or broken stairway, and is hurt.

"Would an action lie against the City of Chicago, or against owner of land ?

"The Department of Demolition has thus far been unsuccessful in its attempts to have the Works Progress Administration assign watchmen to these buildings at the time of their being turned over to the City by the owners.

"W.P.A. does maintain watch service during operations at the site.

"The City has no watchmen for such assignments.

Is the City an *owner*, or co-owner ?

Is the City the owner's agent ?

When does the Agency begin ?"

When the city accepts a building from the owner for the purpose of demolition it assumes such ownership and control of the building as to render the city liable for negligence in the management and operation of the building.

It is true, as a general rule, that a party guilty of negligence is not liable if he does not owe the duty which he has neglected to the person claiming damages. [*Williams v. C. & A. R. R. Co.*, 135 Ill. 491 (1891).]

The city probably would be liable for damages incurred by tenants through the negligence of the city. It would be under no duty, however, to a mere trespasser but under certain circumstances might be liable for injuries to a child of tender years who might trespass on the property.

The general rule is well settled that the private owner or occupant of land is under no obligation to strangers to place guards around excavations upon his land. The law does not require him to keep his premises in safe condition for the benefit of trespassers, or those who come upon them without invitation express or implied, and merely to seek their own pleasure or gratify their own curiosity. [1 Thompson on Negligence, p. 303; *City of Pekin v. McMahon*, 154 Ill. 141 (1895).] An exception, however, to this general rule exists in favor of children. Although a child of tender years who meets with an injury upon the premises of a private owner may be a technical trespasser, yet the owner may be liable, if the things causing the injury have been left exposed and unguarded, and are of such a character as to be an attraction to the child, appealing to his childish curiosity and instincts. (*Burke v. McDermott*, 256 Ill. 401.) (1912.) Such dangerous and attractive instrumentalities become an invitation by implication.

A municipal corporation holding property as a private owner is chargeable with the same duties and obligations which devolve on individuals. Where it owns, leases or controls lands, houses, docks, piers, water and gas works, it is liable, in respect to the care of the same, for injuries arising from neglect, in the same manner as an individual owner is liable, and must respond in the same way for creating or suffering nuisances. (43 Corpus Juris, p. 1163 and cases cited.)

We are of the opinion that when the city accepts the control of a building from an owner for the purpose of demolition as provided in the "Consent Agreements" it becomes the owner of such building and is not a co-owner or an agent.

From the foregoing rules we are of the opinion that the city would be liable for negligence to those suffering damages to whom the city owed a duty, but not to others.

We are attaching hereto amended "Consent Agreements" which we think will afford the city greater protection against liability for damages.

COPYRIGHT INFRINGEMENT AT FREE BAND CONCERT

(No. 10005—Commissioner of Public Works—E. J. B.—May 16, 1939—2 pp.)

The City would not be infringing the copyright of copyrighted selections at the free summer band concerts since these concerts are free and are for charitable purposes. The copyright of musical selections applies only to the performance of such selections publicly for profit.

CHAPTER XII

CITY PROPERTY

A. REAL ESTATE

INDEMNIFYING AGREEMENT WHEN FILLING IN CANAL

(No. 10083—Commissioner of Public Works—D. L. L.—August 22, 1939—2 pp.)

The City has the right and privilege to fill in fifty per cent of Canal "A" without entering into any indemnification agreement with any of the permittees, to save them harmless from any claims arising out of such filling in, as the permits to fill in the canal granted by the State expressly stated the permittees authorized the City to fill in 50 per cent of the canal without cost.

DONATION OF LAND FOR ARMORY PURPOSES

(No. 9948—Committee on Finance—M. H. F.—January 26, 1939—2 pp.)

The City Council has the power to authorize by ordinance the execution and delivery of a deed donating land to the Illinois Armory Board for use as a site for an armory of the National Guard.

Citation: Cities and Villages act, art. V, sec. 100a.

FURNISHING FREE SITE FOR MEMORIAL

(No. 10109—Chicago Plan Commission—R. N.—October 3, 1939—2 pp.)

Notwithstanding that a will requests the City to set aside a suitable site upon which the trustees of the estate may erect a memorial, the City is under no obligation to furnish a free site.

CITY OBTAINING EASEMENT IN SUBMERGED LAND UNDER PARK CONTROL

(No. 10054—Commissioner of Public Works—J. F. G.—July 20, 1939—5 pp.)

If the City desires control of the submerged land off Rainbow Park between E. 75th and E. 79th streets now under the jurisdiction of the Park District, for a new water filtration project and park development, the City Council should declare by ordinance that the area in-

volved is necessary or convenient for it to use, occupy or improve in the making of a public improvement and the Chicago Park District may then, according to its rules, transfer all of its right, title and interest in and to the submerged land to the City.

Citations:

Statutes: IRS '37, 30: 157, 105: 333.12, 327x, 327y, 454a.

Cases: *Cummings v. Chicago*, 188 US 410 (1903).

McCormick v. Chicago Yacht Club, 331 Ill. 514 (1928).

Dupue Rod and Gun Club v. Marliers, 332 Ill. 322 (1928).

OPINION OF FOREGOING SYNOPSIS

In your letter of March 29, 1939 you request our opinion as to the advisability of obtaining for the City from the Chicago Park District a permanent easement in the submerged land off Rainbow Park between E. 75th and E. 79th streets for a new water filtration project and park development.

The State was vested with the title to the beds of all navigable waters within its borders when it was admitted to the Union, subject to the power of Congress over navigation so far as necessary for the regulation of interstate commerce. [*McCormick v. Chicago Yacht Club*, 331 Ill. 514 (1928); *Dupue Rod and Gun Club v. Marliers*, 332 Ill. 322 (1928).]

By an Act approved July 3, 1931 the area of submerged land involved was conveyed to the South Park Commissioners and their successors in office, "to be held, managed and controlled by them for the same uses and purposes as other lands now under their control." (Ill. Rev. Stat. 1937, Chap. 105, Par. 454a.) The Chicago Park District succeeded to the rights of the South Park Commissioners in the submerged land involved by virtue of Section 12 of the Act creating the Chicago Park District. (Ill. Rev. Stat. 1937, Chap. 105, Par. 333.12.)

On February 11, 1937 the Department of Public Works and Buildings, Division of Waterways, of the State of Illinois granted permission to the City to construct the fill, structures and tunnels illustrated in submitted drawings and described in the application for that permit, all of which are a part of a water filtration project and park development to serve the South District of the Chicago Water Works System, upon conditions in which were included the following provisions:

"(b) This authority does not convey or recognize any title of the permittee to any submerged or other lands."

* * *

"That this permit is void unless a similar permit is issued by the U. S. War Department for this project."

On February 27, 1937 the Secretary of War issued a permit to the City of Chicago for authority to construct a filtration plant and related structures in Lake Michigan, opposite Rainbow Park and between 75th and 79th streets extended. This permit merely expresses the assent of the Federal Government so far as concerns the public rights of navigation. [*Cummings v. Chicago*, 188 U. S. 410 (1903).]

By an Act approved July 10, 1935 it is provided:

"Section 1. Any park commission * * * which has heretofore acquired the title to any land adjacent to or adjoining upon or penetrating into any public waters in this State or to the submerged lands and bed of such public waters or any part thereof or to any riparian or other

rights in relation to such public waters, may grant, convey or lease any of such lands or rights to any city having a population of 500,000 or more and owning and operating its waterworks and waterworks system, to be used as a site or sites for buildings and other structures for the purpose of improving and extending such system and for the construction of water purification plants, intakes, tunnels, breakwaters and other structures and appurtenances connected with such waterworks and waterworks system."

"Section 2. Any such park commission * * * may also grant, convey or lease to any such city the right to construct and maintain roadways, tunnels and any other appropriate approaches to or from any such municipally owned and operated waterworks, plants or structures over, across and under any lands and property of such park commission, park board or board of park commissioners."

Ill. Rev. Stat. 1937, Chap. 105, Pars. 327x and 327y.

It will be noted that there is nothing in this Act to authorize a park commission to grant convey or lease any of such lands to the City for park purposes. However, by virtue of "An Act concerning the powers of certain municipal corporations with respect to real estate," approved July 2, 1925, a method of making transfer of real estate from one municipality to another, which covers park districts and cities, is provided. By that Act the City Council may by ordinance declare that the area involved is necessary or convenient for it to use, occupy or improve in the making of any public improvement or for any public purpose and the Chicago Park District may then exercise the power, by a resolution passed by a vote of two-thirds of all the park commissioners, to transfer all of its right, title and interest in and to the submerged land. (Ill. Rev. Stat. 1937, Chap. 30, Par. 157.)

Since the Chicago Park District acquired the land for park purposes only, it could convey to the City of Chicago its title to the submerged land required to be used either for the filtration plant and related structures or for park purposes, or both, by virtue of the Act of July 10, 1935 and the Act of July 2, 1925 above referred to.

The only record of action by the Chicago Park District to which our attention has been directed is a resolution of its board, passed September 8, 1936, concurring in a recommendation of the Chief Engineer, bearing the approval of the General Superintendent of the Chicago Park District, for approval of plans of the City of Chicago for the construction of a filtration plant on submerged lands of Lake Michigan just east of the present shore line between 75th and 79th streets granting the permit for the construction at said location.

We are of the opinion that if the City of Chicago desires control of the area involved it should take the legal steps necessary to secure such right, title and interest as is necessary for all the City's purposes in the manner provided by Section 2 of "An Act concerning the powers of certain municipal corporations with respect to real estate," approved July 2, 1925, hereinafter referred to.

LEASE OF CITY PROPERTY FOR TAVERN

(No. 10060—City Comptroller—M. H. F.—July 24, 1939—2 pp.)

The Illinois Liquor Control law expressly provides that no alcoholic liquors shall be sold or delivered in any building belonging to or under the control of the State or of any political subdivision thereof and it would be improper for the City to lease City property for tavern pur-

poses. After expiration of the prior lease, the building reverted to the control of the City and the restriction on the use of City property became operative.

Citation: Illinois Liquor Control law, art. VI, sec. 11.

SIGHT-SEEING CONCESSION AT THE MUNICIPAL AIRPORT

(No. 10049—*Commissioner of Public Works—J. F. G.—July 12, 1939*
—2 pp.)

The City has the power to contract for the exclusive operation of sight-seeing airplanes at the Chicago Municipal Airport.

Citation: Cities and Villages act, art. I, sec. 100.

VACATION OF PUBLIC PROPERTY FOR HOUSING PROJECT

(No. 9841—*Chairman, South Park Gardens Housing Project—A. F. G.*
—June 10, 1938—5 pp.)

The City has statutory power to vacate, dedicate, sell or convey any of its streets, alleys, parks, sewers or other property situated in the South Park Gardens Project site to the Chicago Housing Authority or the Federal government.

Citations: Cities and Villages act, art. V, sec. 7.

IRS '37, 145: 1.

Ill. Laws, 1937, p. 678 (Housing Cooperation act, secs. 3 (c), 4).

VACATION OF PROPERTY FOR HOUSING PROJECT

(No. 9930—*Executive Secretary, Chicago Housing Authority—A. F. G.*
—December 13, 1938—5½ pp.)

To secure the vacation of the area included in Aldine Square (now Du Saible Square) and the streets and alleys adjacent thereto, being public property held by the City through a statutory dedication, the United States government, owner of all the lots in the plat which includes this public property, may proceed to vacate this land in the manner provided by section 6 of the Plat act.

To secure the vacation of that part of Ellis Park, south of Thirty-seventh street, the United States government, which owns all the lots abutting this part of the "public square" may, if the dedication is a statutory one, vacate that part of the plat on which this property is contained, in the manner provided by section 6 of the Plat act, dealing with the vacation of part of a plat. If the "public square" is a common law dedication, then the City Council may, by ordinance passed by three-fourths of the members of the Council, vacate the property in

question. The property will pass to the abutting owner, the United States.

A small "public square" which in fact is nothing more than a street may be vacated by the City Council under the provisions of the Vacation act.

Citations:

Statutes: IRS '37, 109: 6, 7; 145: 1.

Cases: Prall v. Burckhardt, 299 Ill. 19 (1922).

Counselman v. Wisconsin Lime & Cement Co., 299 Ill. 284 (1922).

Littler v. City of Lincoln, 106 Ill. 353 (1883).

Smith v. Heath, 102 Ill. 130 (1889).

OPINION OF FOREGOING SYNOPSIS

On October 24, 1938 you wrote asking for suggestions as to how to proceed in the matter of vacating the area included in and the alleys adjacent to Aldine Square (now DuSable Square) which is wholly included in the site acquired by the United States Government which site the government proposes to convey to the Chicago Housing Authority for the erection of the South Park Gardens Housing Project. Your communication requests similar information concerning the small section of Ellis Park lying south of 37th street which is also within the government's site.

It would appear that as the United States Government has or is acquiring this site, that the government and not the Chicago Housing Authority should be concerned with these vacations. However we have made a study of the matter and shall give you the result of our research.

Aldine Square is a public space platted as part of a subdivision shown in Book 10 of Plats, page 22, recorded April 26, 1875. The map or plat shows a *public drive*, thirty feet in width, noted thereon, with an entrance thereto from Vincennes avenue thirty feet wide, and a twenty-foot entrance to the alley north of East 38th street. Said public drive surrounds a plot of ground in the center of Aldine Square, 193-25 feet by 250 feet, on which is noted the word "*Public*." There are also two small plots of ground in the Southeast and Northeast corners of said square and abutting said thirty-foot public drive on the west and Vincennes avenue on the east, marked "*Public*," also a small plot of ground, marked "*Public*" on the Northwest corner of said square and abutting the lot lines on the north and west sides of said square and said thirty-foot public drive. A lot line of said subdivision faces said thirty-foot public drive on the north, south and west, and the building line is twenty feet from said public drive.

On the north, south and west of the lots platted abutting the square, alleys are shown on the map. The plat is certified by the City Surveyor, and also contains a certificate by a Justice of the Peace that the owner personally known to him acknowledged the plat to be his act and deed. The plat is approved by the Board of Public Works, and bears the certificate of the Recorder. The City of Chicago accepted the dedication of this public square, which acceptance is evidenced by the appropriation in 1880 and subsequent years of funds to maintain this square. It is at present under the jurisdiction of the Bureau of Parks, Recreation and Aviation.

We are of the opinion that there has been a statutory dedication of the public space, streets and alleys shown on this plat in conformity with Chapter 109, Plats of the Illinois Revised Statutes.

Section 6 of Chapter 109 is as follows:

"Section 6. Vacation of the whole plat.

Any such plat may be vacated by the owner of the premises, at any time before the sale of any lot therein, by a written instrument, to which a copy of such plat shall be attached, declaring the same to be vacated. Such instrument shall be approved by the city council or village or county board (as the case may be) in like manner as plats of subdivisions. Such council or board may reject any such instrument which abridges or destroys any public rights in any of its streets or alleys. Such instrument shall be executed, acknowledged or proved, and recorded, or filed, in like manner as plats of subdivisions; and being duly recorded, or filed shall operate to destroy the force and effect of the recording of the plat so vacated, and to divest all public rights in the streets, alleys and public grounds, and all dedications laid out or described in such plat. When lots have been sold, the plat may be vacated in the manner herein provided by all the owners of lots in such plat joining in the execution of such writing."

We are of the opinion therefore that the United States Government having acquired ownership of all of the lots in this plat, may cause the vacation of this plat and the extinguishment of the public rights therein in the manner provided in the foregoing section. *Prall v. Burckhardt*, 299 Ill. 19; *Counselman v. Wisconsin Lime & Cement Co.*, 299 Ill. 284.

The plat in which the "public square" now known as Ellis Park was laid out, was filed of record on March 21, 1855, in Book 85 of Maps, p. 98. This record was destroyed in the great fire of 1871. The only part of this "public square" involved in this inquiry, are two triangular pieces each about $\frac{1}{4}$ acre in extent lying south of 37th street.

The City of Chicago accepted the dedication of this square and has annually appropriated funds for its maintenance.

(If the dedication of this public square is a statutory dedication, the United States Government which owns all of the lots abutting these pieces may vacate that part of the plat lying south of 37th street and west of Cottage Grove avenue, under the provisions of Section 7 of the Plat Act.) *Littler v. City of Lincoln*, 106 Ill. 353. Section 7 of the Plat Act is as follows:

"Section 7. Vacation of part of plat.

Any part of a plat may be vacated in the manner provided in the preceding section, and subject to the conditions therein prescribed: Provided, such vacation shall not abridge or destroy any of the rights or privileges of other proprietors in such plat: And, provided, further, that nothing contained in this section shall authorize the closing or obstructing of any public highway laid out according to law."

(If it is found that the dedication of this "public square" is a common-law dedication then the City Council may by ordinance passed by three-fourths of the members of said City Council vacate that part of the "public square" lying south of 37th street, the title thereto passing to the abutting lot owners.) Chap. 145 Ill. Rev. Stats. 1937.

The City Council on February 20, 1865, by ordinance, vacated "so much of the Public Square in Ellis East Addition of the City of Chicago on the S. E. $\frac{1}{4}$ of Section 34, Township 39, North Range 14, East of 3rd P. M. as may be required to extend Wapansh avenue (now 37th street) across said Public Square with a sufficient curvature southwardly so as to touch or intersect the full width of Langley street at its northern termination between lots 34 and 35 of said Addition." It was this vacation which created the two triangular pieces of land here involved.

It may be argued that this public square may not be vacated by the City Council under the provisions of the Vacation Act as that Act applies to "any street or alley, or part thereof within their jurisdiction." The square in question is a triangular shaped plat of ground about 344 feet wide at its widest point and about 66 feet wide at its narrowest point. Lots were laid out facing both sides of this triangle. We view this square as nothing more or less than a glorified street. This also is the view of our Supreme Court which in discussing the nature of a rectangular square (Aldine Square) surrounding which lots were laid out on three sides, the court said:

"No reason is perceived why there may not be an easement in favor of individuals, or the public, over a square like this, as over any ordinary street. That is precisely what must have been intended in the donation of the square in this case. Because it was to be a place of beauty in front of dwellings to be erected, it is none the less an easement, in the strictest sense of the term. A street wider than usual, and made attractive by the planting of trees, shrubbery and flowers on the margin, is an easement in favor of either the public or individuals. The same may be said as to a square. What possible difference can it make whether the land donated for an easement is in the form of a narrow strip, or in the form of an oblong or perfect square? One may be more beautiful than the other, but it is still an easement. There is no reason why the square in this case may not be regarded precisely as an ordinary street would be,—as affording an easement in favor of parties interested in the abutting lots." *Smith v. Heath*, 102 Ill. 130-141.

We are therefore of the opinion that the square is of such a nature as to bring it within the provisions of the Vacation Act and if and when vacated, the title to the vacated pieces will vest in the then abutting owners.

ACQUISITION OF FIRE AND BURGLAR ALARM SERVICE

(No. 9839—Chairman, Subcommittee of Committee on Judiciary and State Legislation—J. F. G.—June 10, 1938—2 pp.)

Under its power to protect property against fire and burglary, the City has the right, power and authority to acquire a fire alarm and burglar alarm service, or to extend its present police and fire alarm system into private property and impose a service charge for the protection so given.

OPINION OF FOREGOING SYNOPSIS

We have your letter of May 23, 1938 asking for our opinion "as to whether or not under the Cities and Villages act or any other grant of authority from the General Assembly, State of Illinois, the City of Chicago has power to go into the business of furnishing fire alarm, sprinkler alarm, burglar alarm and watch service." The question appears to be pertinent to the consideration of an ordinance authorizing the Illinois District Telegraph Company to maintain and operate a line of wires for the transmission of signals by electricity concerning which we wrote to you on April 27, 1938. Section 8 of the proposed ordinance provides that the City of Chicago shall have the right to take over the property of the grantee and operate the same as a municipal enterprise.

There is no express power anywhere in the Cities and Villages act or any other grant of authority from the General Assembly authorizing the city to engage in the business referred to. There is a provision for any

city to acquire and operate a public utility by an ordinance which must be submitted to the electors and approved by a majority of those voting thereon, but the business of furnishing fire alarm, sprinkler alarm, burglar alarm and watch service is not that of a public utility as defined in the Public Utilities act or in the act authorizing cities, villages and incorporated towns to acquire and operate public utilities.

However, it is our opinion that under the city's power to protect property against fire and burglary, the city would have the right, power and authority to acquire a fire alarm and burglar alarm service. As a matter of fact, the city now does operate a similar facility known as the Police and Fire Alarm System. In our opinion there can be no objection to extending such a system into private property and imposing a service charge therefor as an incident to the power of the city to protect property against burglary and fire. The city now makes similar charges for the assignment of policemen and firemen at the request of private property owners.

HOSPITAL CHARGE FOR NON-RESIDENT

(No. 9983—Acting President, Board of Health—M. D. S.—April 13, 1939—2 pp.)

Where a non-resident was treated at the City's Contagious Disease Hospital, the City has a claim against the patient for the hospital fees charged for a non-resident patient, but has no claim against the municipality in which the patient resides.

Citations:

Statute: ISBS '37, 23: 176h.

Ordinance: Code '31: 248.

B. WATERWORKS

SALE OF WATER TO BROOKFIELD—NORTH RIVERSIDE WATER COMMISSION

(No. 9801—Commissioner of Public Works—M. H. F.—April 4, 1938—5½ pp.)

The City may sell water to the Brookfield-North Riverside Water Commission provided the Commission causes water mains to be built to the City's boundary, and provided the water requirements of the City for itself and its inhabitants are not prejudiced by such sale of water.

Citations:

Statutes: IRS '37, 24: 460.1-460.6, 42: 348.

Case: Chicago v. Town of Cicero, 210 Ill. 290 (1904).

Other references: Op. Corp. Coun. (1914-15), p. 334.

Op. Corp. Coun. (1926-27), p. 628.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your communication of March 25, 1938 which transmits copies of letters addressed to you February 8, 1938 and March 1, 1938 by the Brookfield-North Riverside Water Commission concerning a connection to the water distribution system of the City of Chicago, together with a copy of your reply dated March 25, 1938 to these letters. You request our opinion whether or not the City of Chicago can legally enter into an agreement for the sale of water to the Brookfield-North Riverside Water Commission.

From the correspondence, it appears that the Brookfield-North Riverside Water Commission is a water commission created jointly by the Villages of Brookfield and North Riverside under the act entitled "An act to provide for the joint acquisition and operation of a waterworks or a common source of supply of water or both by certain cities, villages or incorporated towns and authorizing the issuance of bonds for such acquisition and for improvements and extensions thereto, secured only by the revenues derived from the operation thereof," approved July 6, 1935, paragraphs 460.1 to 460.6, inclusive, chapter 24, Illinois Revised Statutes, 1937, which act authorizes two or more adjacent cities, villages or incorporated towns whose corporate limits in part abut upon each other to elect by ordinance of the respective governing bodies thereof to acquire and operate jointly a waterworks system or a common source of supply of water or both. It is said that the Brookfield-North Riverside Water Commission plans to acquire water from the City of Chicago in order to supply not only the Villages of Brookfield and North Riverside but also the Villages of Riverside and La Grange, and also the Electro Motive Corporation (Diesel plant of General Motors) and the Chicago Zoological Park in Brookfield. All of these municipalities are said to be located within the Sanitary District of Chicago. Neither of them is contiguous to the City of Chicago.

Section 2 of the act above mentioned provides that upon the adoption of an ordinance by the governing body of any of such cities, villages or incorporated towns, the mayor or chief executive officer of such municipality, with the approval of the governing body, shall appoint a commissioner, and the commissioners so appointed by such cities, villages or incorporated towns shall, together with a like commissioner appointed by the judges *en banc* of the Circuit Court of the circuit in which such municipalities are situated, constitute a commission and public body corporate with the powers and duties as provided for in the act. Said section specifically provides that such commission may contract and be contracted with and sue and be sued.

Section 3 provides for the organization of the commission and the management of the water system. By it the commission is authorized to contract with the respective cities, villages or incorporated towns for a supply of water to such cities, villages or incorporated towns for a period not exceeding fifty years. The commission is authorized to pledge or appropriate any income it may derive pursuant to any such contracts or by virtue of the operation of a waterworks or a common source of supply of water or both.

Section 4 of the act provides that for the purpose of acquiring waterworks or a common source of supply of water, or both, or for making improvements and extensions to the same, the commission may issue in its corporate name revenue bonds payable solely from the revenues to be derived pursuant to the contracts with the cities, villages or incorporated towns, or by virtue of its operation of any properties acquired or to be acquired. Such bonds shall not constitute an indebtedness of any of the cities, villages or incorporated towns represented by the commission.

Section 5 of the act provides that whenever bonds are issued, sufficient revenue received from the operation of the properties under control of the commission, shall be set aside as collected and be deposited in a separate fund to be used in paying the cost of operation and maintenance of the properties, providing an adequate depreciation fund, and paying the principal of and interest upon the bonds issued. Holders of bonds may compel by court action performance of all the duties required by the act.

Section 26 of an act entitled "An Act to create sanitary districts and to remove obstructions in the Des Plaines and Illinois rivers," approved May 29, 1889, paragraph 348, chapter 42, Illinois Revised Statutes, 1937, imposes upon the City of Chicago, the city being located within the district and having a system of waterworks, an obligation to furnish water to other municipal corporations in the district bordering upon it, which have no waterworks system, at Chicago's boundary line, at no greater price or charge than it charges and collects of consumers within its limits for water furnished through meters in like large quantities.

City of Chicago v. Town of Cicero, 210 Ill. 290.

By a proviso added to Section 26 June 28, 1917, cities, incorporated towns and villages situated within said sanitary district but having no territory bordering upon the City of Chicago are given the right to receive water from it in the same manner and under the same conditions as though they had territory bordering upon it, provided they build or cause to be built suitable and sufficient water mains to Chicago's limits to connect with the water mains and receive the water from Chicago.

While under Section 26, as amended, the Villages of Brookfield and North Riverside, by causing to be built water mains to Chicago's boundary, might be in a position to demand a supply of water, we find no adjudicated case holding that a water commission is likewise entitled to acquire the city's water under said section. However, the determination of the question whether a water commission created by two or more municipalities located within the Sanitary District of Chicago is entitled to the same rights enjoyed by its constituent municipalities or the municipalities causing its creation, is not necessary for the purposes of this opinion if the City of Chicago is willing to sell water to the Brookfield-North Riverside Water Commission, provided it may do so legally.

Our opinion is that it may do so legally. In support of this conclusion, we invite your attention to a former opinion rendered the Commissioner of Public Works February 24, 1915 (Opinions of the Corporation Counsel and Assistants from October 6, 1914 to April 26, 1915, p. 334) wherein this department expressed the view that the city had the right in its discretion to furnish water to the Chicago & Western Indiana Railway Company outside the city limits, provided the water requirements of the city for itself and inhabitants are not prejudiced thereby. See also the opinion given the Commissioner of Public Works February 16, 1927 (Opinions of the Corporation Counsel and Assistants, Vol. XV, p. 628) wherein this department expressed the view that the city with council authority might sell water to a consumer located outside the city limits and also outside the State of Illinois.

Because the courts have not specifically decided the question whether Illinois water commissions may compel the sale of water to them, we would regard it advisable before a contract is entered into with the Brookfield-North Riverside Water Commission, that you obtain council authority therefor expressed in ordinance form and that such terms and conditions be incorporated into the contract as would fully protect the city and its inhabitants.

WORK ON WATER MAIN IN STATE HIGHWAY WITHIN LIMITS OF VILLAGE

(No. 9803—*Commissioner of Public Works*—C. P. H.—April 6, 1938—2½ pp.)

The Municipal Tuberculosis Sanitarium may authorize the City Department of Public Works to make an opening in West Cermak road, a State highway, within the corporate limits of the Village of North Riverside to separate the Sanitarium's water pipe line from the common system used by the Sanitarium, the City of Berwyn and the Village of North Riverside, despite the refusal of the Village of North Riverside to issue a permit, as the Sanitarium has obtained permits from the State Department of Public Works and Buildings which has exclusive control over State highways.

The owner of property abutting on a public street or other public way has the right of access to public utilities extending through the street in front of his property, subject only to the paramount right of the public to use the street for travel. A temporary interference with public travel with the consent of the public authority controlling the street, in this case the State, is not an unlawful interference with the public use of the street.

Citations: IRS '37, 121: 296b, 297, 300, 300c.

RELOCATION OF WATER MAINS BECAUSE OF SUBWAY

(No. 10127—*Commissioner of Public Works*—W. V. S.—November 1, 1939—2½ pp.)

The ordinance providing for the construction of the initial system of subways may be construed to require the relocation of all utilities including municipally owned water mains.

Citations:

Statute: IRS '39, 24: 569g.

Ordinance: Coun. J. (1938-39), p. 7218, secs. 7, 8.

COMPENSATION FOR WATER MAINS IN VACATED STREETS

(No. 9898—*Commissioner of Public Works*—A. A. S.—October 17, 1938—2 pp.)

The City cannot secure compensation from the Board of Education for the abandonment of water mains in certain vacated streets, because the Council at the time of the passage of the vacation ordinance did not fix the compensation to be paid by the Board of Educa-

tion. It would be impossible for the City in the vacation ordinance to have reserved the right to operate its water mains in the vacated streets.

Citation: *People ex rel. Greer v. Chicago*, 154 Ill. App. 578 (1911).

FREE INSTALLATION OF WATER SERVICE PIPE

(No. 9853—*Alderman, 28th Ward—R. N.—June 29, 1938—1½ pp.*)

While the City Council has power to authorize the issuance of free permits to religious or educational institutions, it lacks the power to install material, such as a water service pipe, free of charge.

ACCEPTING OF EASEMENT FROM A PRIVATE PERSON

(No. 10074—*Commissioner of Public Works—E. H.—August 9, 1937—2 pp.*)

The City may accept an easement from a private company authorizing the installation of water mains under its property without being legally bound to pay any accumulated back taxes against the property involved. An ordinance should authorize the acceptance of the easement.

RELIEVING RELIEF CLIENTS OF PAYING WATER BILLS

(No. 10029—*Commissioner of Relief—M. H. F.—June 10, 1939—2 pp.*)

An ordinance which would relieve recipients of public relief, who are owners of property and water users, from paying water bills during the period they are on relief, provided that any income from the property should be applied against unpaid water bills, is of doubtful validity as it would discriminate between users of water and would divert water funds to emergency relief.

WATER EXTENSION CERTIFICATE REFUND

(No. 9979—*Commissioner of Public Works—M. D. S.—April 12, 1939—2 pp.*)

The cost of extending water mains where it would be a public benefit and a non-revenue producing main should be charged to the water fund and the claim for refund of the water deposit should be allowed in view of the long established practice to so treat the cost of such water mains.

Citations:

Ordinance: Code '31: 4139, 4144.

Other reference: 12 CJ 1315.

PAYMENT OF WATER REFUND

(No. 10036—*Commissioner of Public Works—E. J. B.—June 21, 1939—2 pp.*)

Where a refund is due on a water certificate which represented a deposit paid by a bank as trustee, and this certificate was later assigned, the refund should be paid to successor trustee.

DIVERSION OF REVENUE FROM ONE WATER MAIN TO MAKE UP SHORTAGE ON ANOTHER

(No 9870—*Commissioner of Public Works—E. H.—August 11, 1938—4½ pp.*)

Under the existing ordinance governing the refunds to property owners who paid the special assessment on Mulligan avenue and Merrimac avenue water mains, it would be illegal to divert part of the revenue from the Fifty-first street main in order to make up the shortage in revenue required to make a 90% refund to the property owners of Mulligan and Merrimac avenues.

Citations:

Ordinance: Code '31: 4142.

Cases: Galt v. Chicago, 174 Ill. 605 (1898).

Chicago and Northern Pacific Railroad v. Chicago, 174 Ill. 439 (1898).

C. TAXATION OF CITY PROPERTY**RETAILERS' OCCUPATION TAX ON COAL DELIVERED TO THE CITY AT THE MINE**

(No. 9744—*Commissioner of Public Works—M. H. F.—January 6, 1938—6 pp.*)

In advertising for bids for coal for City institutions, the City may insert in the specifications a provision that it shall acquire title to the coal at the mines and that the seller is liable for the retailers' occupation tax. The selling price upon which the seller would be obligated to pay the retailers' occupation tax would be the price f.o.b. the mines. The City by taking title at the mines would pay the freight charges for shipping the coal to its various institutions to the railroad companies directly or through an agent. The retailers' occupation tax would not apply to these freight charges.

Citations:

Statutes: IRS '37, 120: 440, 441.

Case: Gee Coal Co. v. Department of Finance, 361 Ill. 293 (1935).

Other reference: State Department of Finance, rules and regulations relating to the Retailers' Occupation Tax act (July 1, 1937), rule No. 25.

OPINION OF FOREGOING SYNOPSIS

Your communication of December 17, 1937 states that the State of Illinois in its proposal blanks for bituminous coal makes the following statement:

"It is understood and stipulated that the State acquires title at the mine with respect to coal shipped from mines to State institutions in carload lots, and that the vendor is liable for Retailers' Occupation Tax measured by the price of such coal f. o. b. mines. It is further understood and stipulated that with respect to coal required to be delivered by the vendor with his own equipment to bins at State institutions, the State acquires title to such coal at point of delivery, and the vendor is liable for Retailers' Occupation Tax measured by the price of such coal delivered to the respective State institutions."

You tell us that the City of Chicago has not included such a provision in its specifications believing that it had no authority to indicate that there would be no application of the retailers' occupation tax to the freight portion of the coal bill, and because of the omission the State in its capacity as a tax collector is attempting to collect the tax upon the entire bill. You state that in the event the coal trade as a whole were to anticipate the State Treasury Department's interpretation, the tax would be included in their bidding and therefore the city would in reality be paying the additional amount. You further state that it has been found necessary because of complications as to billing and auditing and to some extent because of inability to make prompt freight payments to provide that the city's coal contractors prepay the freight, and because the freight does not appear as a separate item there has been some doubt of the department's authority to announce that the retailers' occupation tax would not apply to the freight portion of the payments for coal. Our advice is sought as to the propriety of including a statement in the city's coal specifications similar to the one which is said to be contained in the State's proposal blanks.

The Retailers' Occupation Tax Act imposes a tax upon persons engaged in the business of selling tangible personal property at retail at the rate of a prescribed percentage of the gross receipts from such sales in this State of tangible personal property made in the course of such business. As defined in the act "gross receipts" from the sales of tangible personal property at retail means the total selling price or the amount of such sales. "Selling price" or the "amount of a sale" means the consideration for a sale valued in money without any deduction on account of the cost of the property sold, the cost of materials used, labor or service cost, or any other expense whatsoever. (Paragraphs 440 and 441, Chapter 120, Illinois Revised Statutes, 1937.)

In the case of *Gee Coal Co. v. Department of Finance*, 361 Ill. 293, the Supreme Court of Illinois determined that the provision of the act that selling price shall be determined without any deduction for labor or service cost, or any other expense whatsoever, is all-embracing, and that a coal company in computing the amount of its occupation tax could not exclude from the amount of its gross receipts the amounts paid it by customers to reimburse it for freight charges in shipping the coal from the mines to the company, as such charges constitute a part of the selling price to consumers.

If it is your intention to purchase coal f. o. b. mines no objection is seen to your stating in your specifications a provision reciting that the city acquires title at the mines with respect to coal shipped from mines to city institutions in carload lots and that the vendor is liable for the retailers' occupation tax. Coal purchased under such an agreement would become the property of the city at the mines. So far as the occupation tax was concerned the selling price upon which the contractor would be obligated

to pay a tax would be the price f. o. b. mines. When the city takes title to the coal at the mines it could then have it shipped to its various institutions in Chicago paying the railroad companies the freight charges either directly or through an agent. To these freight charges the Retailers' Occupation Tax Act would not, in our opinion, apply. We therefore see no objection to your incorporating in your specifications a provision similar to that contained in the State proposal blanks.

By taking title at the mines the city of course would assume responsibility for the coal from the date of delivery to it at the mines and would probably be required to carry insurance to protect itself against losses in transit. After title has passed at the mines to the city the railroad company in transporting the coal to Chicago would be rendering services not to the seller but to the city. This is a determinative factor.

If you propose to make the seller your agent for the purpose of pre-paying for you the freight charges and in tracing shipments, no objection is seen to this arrangement provided the seller does not commingle the freight charges with the selling price of the coal so as to cause a suspicion in the minds of the State Department of Finance that the scheme is for the purpose of enabling the seller to evade payment of the occupation tax on the freight items, which payment would be proper in case the freight charges constituted a part of the selling price.

Your attention is invited to rule No. 25 of the Rules and Regulations relating to the Retailers' Occupation Tax Act issued by the Department of Finance July 1, 1937, which reads in part as follows:

"Whether or not freight, delivery, or transportation charges may be deducted by the seller from the selling price of tangible personal property sold for use or consumption, in computing his liability for tax under the Retailers' Occupation Tax Act, does not depend upon the separate billing thereof, but depends upon whether or not the services rendered by the railway company or other transporting agency are rendered to such seller or to the purchaser.

"If the seller contracts to deliver tangible personal property to some designated place, or is obligated under the contract to pay transportation charges to some designated place, the transportation services are rendered to the seller and the selling price of the tangible personal property so transported must include the amount of the transportation charges. In this event such charges are *not deductible* by the seller in computing his tax liability under the Act. On the other hand, if the seller contracts to sell tangible personal property f. o. b. origin, the title to the property passing at such point to the buyer and the buyer pays the transportation charges, then the transportation services are rendered to the buyer and are not a part of the selling price of the vendor. Therefore, such transportation charges should *not be included* by the vendor in computing his tax liability under the Act. These principles will apply irrespective of whether such charges are separately billed by the seller from the tangible personal property sold.

"* * * a person engaged in the business of selling coal for use or consumption may not, in computing his tax, deduct from the selling price of coal, freight or delivery charges accruing on account of the transportation of the coal from the mine to his yard or warehouse, or from his yard or warehouse to the consumer, if under the contract of sale he is obligated to deliver the coal to the residence or place of business of the consumer. This is true notwithstanding that such items may be separately set up in his billings to the consumer. See *Gee Coal Co. v. Department of Finance*, 361 Ill. 293.

"In all cases the determining factor is the place where title to tangible personal property passes to the user or consumer, and any freight, delivery or other transportation charges incurred and paid by

the seller for the purpose of transporting such property to such place are a part of the selling price of such property.

"Where property is sold on terms whereunder the seller agrees to deliver such property to a certain place, but the purchaser pays the freight in the first instance and deducts it from the seller's invoice price of the goods in making remittance to the seller for the goods, the transportation charges are deemed to be a part of the selling price of the tangible personal property and the seller will be liable for tax with respect to the amount thereof."

It is significant to note that the Department of Finance contemplates that the seller of coal may prepay the freight charges for the purchaser and bill them to the purchaser who has taken title to the coal at the mines. The study of the rule will probably aid you in the solution of your problem.

TAX ON SALVAGED BUILDING MATERIALS SOLD BY CITY

(No. 9874—*Engineer in Charge of Demolition—A. F. G.—August 17, 1938—2½ pp.*)

The City is not subject to the retailers' occupation tax on sales to wrecking contractors of building material salvaged from demolished buildings when the companies purchasing these materials from the City do not use the materials but resell them to the public. The Retailers' Occupation Tax act imposes a tax upon persons making the last sale of tangible personal property before use or consumption.

Citations:

Statute: IRS '37, 120: 440 (Retailers' Occupation Tax act, sec. 1).
Case: Bradley Supply Co. v. Ames, 359 Ill. 162 (1935).

TAX ON ELECTRICITY SUPPLIED TO CITY OFFICES ON NAVY PIER

(No. 9858—*Harbor Master—M. H. F.—July 5, 1938—2 pp.*)

In supplying electricity purchased from Commonwealth Edison Company to the Navy Pier offices of the Department of Police and the Bureau of Streets and to the offices of the WPA projects sponsored by the Bureau of Streets, the City is not engaged in the business of selling electricity so as to make it subject to the tax imposed by the Illinois Public Utility Tax act. Reports to the Commonwealth Edison Company should treat such electricity as that used by the City and not resold.

Citations: 19 Op. Corp. Coun. 378 (No. 9480), 381 (No. 9491), 384 (No. 9516).

GROSS RECEIPTS TAX ON ELECTRICITY FOR LIGHTHOUSE

(No. 9789—*Commissioner of Public Works—M. H. F.—March 2, 1938*
—2 pp.)

The City is not liable to pay a tax on the gross receipts for electricity furnished to the United States Bureau of Lighthouses and Lighthouse Service as the Bureau is a part of the Department of Commerce of the United States government and is not a corporate entity engaged in the performance of a governmental function.

Citations:

Statutes: USCA, title 5, sec. 597; title 33, sec. 711.

Other references: Department of Finance Regulations, art. 16.

Department of Finance Bulletin, February 17, 1938.

TAXATION OF LEASED CITY PROPERTY

(No. 9862—*Alderman, 28th Ward—C. H. L.—July 21, 1938—7½ pp.*)

If land of the City, exempt from taxation, is leased to a person whose property is not so exempt, said lessee is not liable for the general taxes, unless he has agreed by the terms of the lease to pay these taxes. An agreement in the lease to pay taxes levied on the buildings and improvements will make the lessee liable for taxes thereon. Where such leasing does not make the land taxable, the leasehold estate becomes property of the lessee and is taxable.

Citations:

Statute: IRS '37, 120: 2.

Cases: *People v. Chicago Union Lime Co.*, 361 Ill. 304 (1935).
People v. Rockford Lodge, B.P.O.E., 348 Ill. 528 (1932).
People v. Elmwood Cemetery Co., 317 Ill. 547 (1925).
Chicago v. University of Chicago, 302 Ill. 455 (1922).
People v. International Salt Co., 233 Ill. 223 (1908).

OPINION OF FOREGOING SYNOPSIS

In your letter of June 15, 1938 you request an opinion from the Corporation Counsel relative to terms of the ninety-nine (99) year lease on the above premises. The controversy between the County of Cook, the City of Chicago and the Mercantile Building Corporation in *People v. Mercantile Building Corporation*, No. 35-C-902, is whether or not the tax levied on leasehold interest should be paid by the Mercantile Building Corporation.

The lease herein involved contains the following stipulations on page 2 thereof:

"Said party of the second part, for himself, his heirs, executors, administrators and assigns, further covenants and agrees to and with the said party of the first part, its corporate successors and its assigns, that the said party of the second part, his heirs, executors, administrators and assigns, will pay all water rates and all taxes and special assessments of every nature and kind whatsoever, which may be levied, imposed or assessed during the continuance of this lease upon the said

building or improvements of any kind which may after the date of these presents and before the expiration of this lease, be erected, made, placed or imposed thereon, and all special assessments upon said land, and if such tax, rate or special assessment shall be paid by said lessor after due, the amount or amounts so paid from time to time therefore, shall be repaid as additional rent to said lessor, with interest at the rate of eight (8) per cent per annum thereon, when the next installment of rent falls due after any such payment. It being expressly understood, covenanted and agreed by and between the parties hereto, for themselves and their respective heirs, executors, administrators, corporate successors and assigns, that the first annual tax to be paid upon said building by said lessee, his heirs, executors, administrators and assigns, shall be that of the year one thousand eight hundred and eighty-seven (1887), and the last that of the year one thousand nine hundred and eighty-five (1985).

"It is expressly understood, covenanted and agreed by and between the parties hereto, for themselves and their respective heirs, executors, administrators, corporate successors and assigns, that the party of the second part, his heirs, executors, administrators or assigns, *shall not be obliged or compelled to pay any taxes of any kind, sort or description whatsoever* (except special assessments), *levied, laid, assessed or imposed upon said land, but only such taxes and water rates and assessments as may from time to time be levied, imposed or assessed upon the buildings or improvements erected upon the said premises, and special assessments upon the land as hereinbefore set forth.*"

From the above language of the lease it is evident, as will be seen particularly from the parts thereof which we have underscored, that:

(1) The parties to the lease specifically exempted the land, and the land only, from any and all general taxes;

(2) The lessee, Mercantile Building Corporation, is to pay all taxes, special assessments and water rates assessed upon the building or improvements on the premises.

It is also evident that lessee is to pay "such taxes * * * as may from time to time be levied, imposed or assessed upon the buildings or improvements erected upon the said premises."

Chapter 120 of the Revenue Act, Section 2 of Ill. Rev. Stats., 1937, State Bar Association Edition, (page 2621) provides:

"Property exempt from taxation.) Section 2. All property described in this section, to the extent herein limited, shall be exempt from taxation, that is to say: * * *

"Sixth—* * * all property owned by any city * * * located within the incorporated limits thereof; except as heretofore been leased or may hereafter be leased by such city * * * to lessees who are bound under the terms of the lease to pay the taxes on such property."

From our interpretation of the above statute we are of the opinion that the Mercantile Building Corporation, not being bound by the lease to pay any general taxes on the land, the property is exempt from such general taxes. We are further of the opinion that the Mercantile Building Corporation being bound by the lease to pay such taxes as are levied on the buildings and improvements, the property is not exempt from these taxes. The law of this state is that all real and personal property in the State must be assessed and taxed, except such as may be exempted.

In *People v. Chicago Union Lime Co.*, 361 Ill. 304, the court said at page 306:

"* * * Section 1 of the Revenue Act (Cahill's Stat. 1933, chap. 120, p. 2302; Smith's Stat. 1933, p. 2352); provides that all real and personal property in this State must be assessed and taxed except such as may be exempted. This statutory section is the expression of the authority granted by section 1 of article 9 of our State constitution whereby power is given to tax. Property exempt from taxation must fall within some of the classifications made by section 3 of article 9 of the constitution. The phrase 'all real and personal property in this State' embraces property, both tangible and intangible, of every kind and character. (*People v. National Box Co.*, 248 Ill. 141.) Exhausted stone quarries are not named in any of the constitutional exceptions. The enumerated class of property exempted by constitutional provision is a limitation on the power of the legislature to exempt any other property and all property not within the exemption is subject to taxation. (*People v. City of St. Louis*, 291 Ill. 600.) The property in question is real estate subject to taxation."

And in *People v. Rockford Lodge B. P. O. E.*, 348 Ill. 528, the court said at page 532:

"It is a well settled principle of construction thoroughly established in this State, that statutes exempting property from taxation must be strictly construed and cannot be extended by judicial interpretation, and that the burden is on the person claiming that specific property is exempt from taxation to show clearly that it is within the contemplation of the law. *People v. Western Seaman's Friend Society*, 87 Ill. 246; *People v. Ryan*, 138 id. 263; *People v. Wabash Railway Co.* id. 85; *Catholic Knights v. Board of Review*, 198 id. 441; *In re Walker*, 200 id. 566; *Supreme Lodge v. Board of Review*, 223 id. 54; *Congregational Publishing Society v. Board of Review*, 290 id. 108; *In re Allerton*, 296 id. 340; *People v. Walters Chapter D. A. R. supra*; *People v. City of Chicago*, 323 Ill. 68; *People v. Phi Kappa Sigma*, 326 id. 573; *People v. Withers Home*, 312 id. 136."

The law of the State also provides that one claiming exemption from taxation has the burden of showing clearly that the property is within the exemption statute.

In *The People v. Elmwood Cemetery Co.*, 317 Ill. 547, the court said, at page 549:

"* * * The burden devolves upon one claiming exemption from taxation to show clearly that the property is within an exemption statute. (Citing cases)."

The questions that arise here are:

1. What is a leasehold estate?
2. Is the property subject to a tax on the leasehold?
3. Does the language "taxes on buildings and improvements" include taxes on the leasehold interest?

In *Chicago v. University of Chicago*, 302 Ill. 455, the Supreme Court said, at page 457:

"* * * In this case there was no attempt to assess the fee or reversion but the court held it to be exempt, and the leaseholds and improvements are not school lands or proceeds of school lands. The leaseholds are the property of the lessees, and the improvements have been created, paid for and are for the benefit of the lessees, to enable them to enjoy the leasehold estates. The leases created no charge against the lands on account of taxes or assessments, but the lessees covenanted to pay all water rates and all taxes, duties and assessments, general or special, levied or assessed upon the premises during the continuance of the leases."

It will be noted that the ninety-nine (99) year lease, as the lease here involved, created no charge against the lands on account of taxes, and did provide, as here, that the lessee covenanted to pay all water rates and all taxes and assessments levied or assessed upon the premises during the continuance of the lease.

The court continues on pages 458-459:

"* * * Section 60 of the Revenue Act provides that when real estate is exempt from taxation is leased to another whose property is not exempt and the leasing of which does not make the real estate taxable, the leasehold estate and appurtenances shall be listed as the property of the lessee thereof, or his assignee, as real estate. * * * Although by virtue of the common law a leasehold remains a chattel real, it is within the power of the State to declare its nature contrary to the common law for the purpose of taxation. (*People v. International Salt Co.*, 233 Ill. 223.) For such purpose the legislature may declare personalty to be real estate and real estate personalty. (*Johnson v. Roberts*, 102 Ill. 655; *Shelbyville Water Co. v. People*, 140 id. 545; *Knopf v. Lake Street Elevated Railroad Co.*, 197 id. 212.) * * * It is also to be noted that section 3 of Chapter 77 of our statutes, governing judgments, decrees and executions, declares that the term 'real estate,' as used in the act, shall include estates for years and leasehold estates when the unexpired term exceeds five years. * * *

and on pages 460-461:

"The assessment was against the leasehold estates alone and not against the reversion, which was exempt, and the assessment was limited to the leasehold and improvements. The argument that the court erred is based on the rule that an assessment proceeding is *in rem* against the property itself and not against the several estates existing therein nor against the owner. (*Craw v. Village of Tolono*, 96 Ill. 255; *Dempster v. People*, 158 id. 36; *Gibler v. City of Mattoon*, 167 Id. 18; *City of Chicago v. Partridge*, 248 id. 442.) The charge is against the property benefited, and the purpose of the proceeding is to impose a burden or charge upon that property. It is true that in the case of these leasehold estates running for 99 years the owner of such an estate may have sub-let a portion, and the sub-lessee may have divided his portion into different departments and made short-term leases of different subdivisions. The assessments were against the leasehold estates in the several lots in exact conformity with the law, and there was no question of different judgments or apportionments among individuals who may have offices of apartments in the building of the lessee. The court was correct in the conclusion that the question of an apportionment or separate judgments was in no way involved.

* * *

"* * * Where the fee was not exempt the assessment was against the lot, including all the various interests therein, but where there were long-term leases in and improvements upon land exempt from taxation, that, only, was assessed which could be legally assessed, which was the leasehold estate. There was no discrimination in this."

In *People v. International Salt Co.*, 233 Ill. 223, the court said, at page 225:

"* * * Section 60 of chapter 120, Hurd's Statutes of 1905, is as follows: 'When real estate, which is exempt from taxation, is leased to another whose property is not exempt, and the leasing of which does not make the real estate taxable, the leasehold estate and the appurtenances shall be listed as the property of the lessee thereof, or his assignee, as real estate.' Clearly this statute makes the leasehold estate of appellant subject to taxation and requires it to be taxed as real estate."

Paraphrasing the above citation, it is apparent that the real estate here involved which is exempt from taxation, being leased to the Mercantile Building Corporation whose property is not exempt, and the leasing of which does not make the real estate taxable, the leasehold estate here involved and the appurtenances shall be listed as the property of the lessee, Mercantile Building Corporation, or its assignee, as real estate. Clearly this statute makes the leasehold estate of the Mercantile Building Corporation subject to taxation and requires it to be taxed as real estate.

STAMP TAX ON CITY DEEDS

(No. 9925—City Comptroller—J. F. G.—December 6, 1938—1 p.)

Neither quitclaim deeds issued by the City in settlement of tax claims nor other deeds executed by the City require documentary tax stamps. Municipal corporations are exempt from the stamp tax imposed by the United States government on instruments conveying real estate.

Citation: 26 USCA 906a, 907 (Revenue act).

Opinion No. 9763 of January 25, 1938, to the Chicago Housing Authority holds substantially the same as the above opinion.

CHAPTER XIII

CONTRACTS

A. BIDS AND AWARDS

PROCEDURE FOR COMPUTING BIDS FOR SUPPLIES

(No. 10035—Commissioner of Public Works—M. H. F.—June 19, 1937
—4 pp.)

It is not necessary specifically to notify prospective bidders that the statutory provisions on computing bids for supplies will be followed, but it would be advisable to give such notice.

Where the statute requires that all contracts for supplies should be let to the lowest bidder giving due weight to the Illinois retailers' occupation tax to which the bidder may be subject, the officer letting the contract is not obligated to make an independent investigation in order to determine the correctness of the claim of the bidder, that the sale will or will not be subject to the Illinois retailers' occupation tax, but may rely upon the evidence submitted as being *prima facie* correct.

Citation: Cities and Villages act, art. V, sec. 94.

OPINION OF FOREGOING SYNOPSIS

Your letter of June 2, 1939 invites our attention to provisions of the Illinois statutes relative to computing bids for supplies furnished to municipal corporations, and seeks our advice respecting a proposed procedure to be followed by your department. The statutory provisions are section 94 of article V of the Cities and Villages Act and an act entitled "An Act in relation to the purchase of materials, products, supplies and provisions for certain institutions in this State," approved June 14, 1937. Section 94 of article V of the Cities and Villages Act reads as follows:

"To provide by ordinance, that all the paper, printing, stationery, blanks, fuel and all the supplies needed for the use of the city or village, shall be furnished by contract, let to the lowest bidder. For the purpose of determining the lowest bidder, an amount equal to the tax which a bidder subject to the 'Retailers' Corporation Tax Act,' approved June 28, 1933, as amended, would be required to pay on the gross receipts of such bid, pursuant to said Act, shall be added to the bids submitted by bidders who are not liable for such tax. If any one of such bids shall be the lowest bid after such amount is added, then the contract shall be awarded in accordance with the bid originally submitted."

The Act of June 14, 1937 reads as follows:

"Computing bids for public supplies by bidders not subject to retailers' tax.) Sec. 1. Every officer or other person in charge of the purchase of materials, products, supplies and provisions for any institution owned or operated by the State or by any municipal corporation or political subdivision thereof, shall for the purpose of determining

the lowest bidder in the case where bids or proposals are requested for materials, products, supplies and provisions for any institution owned or operated by the State (other than fuel, stationery and printing paper for such State institutions) or by any municipal corporation or political subdivision thereof, add an amount equal to the tax which a bidder subject to the 'Retailers' Occupation Tax Act,' approved June 28, 1933, as amended, would be required to pay on the gross receipts of such bid, pursuant to said Act, to the amount of the bids submitted by bidders who are not liable for such tax. If any of such bids shall be the lowest and best bid, quality considered, after such amount is added, then the contract shall be awarded in accordance with the bid originally submitted.

"Penalty for violation.) Sec. 2. Any officer or person who violates any provision of this Act shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine not to exceed one hundred dollars (\$100) or by imprisonment in the county jail for not to exceed thirty days, or shall be both so fined and imprisoned in the discretion of the Court."

Your first question is as to whether or not it is necessary on the one hand or advisable on the other, to specifically notify prospective bidders that the method of canvassing bids indicated in the above quoted statutory provisions will be followed by the Commissioner of Public Works.

While it is a legal axiom that everyone is presumed to know the law, and likewise a well established principle that persons dealing with municipal corporations are chargeable with knowledge of the laws pertaining thereto, and in our opinion it is not necessary to specifically notify prospective bidders that the statutory provisions will be followed in computing bids, we believe that the giving of such notice by your department would be highly advisable.

Secondly, you request our opinion as to whether the form of notice set forth in your letter is sufficient. It is our view that it is, except that we believe that it would be well to incorporate a recital that the notice is given pursuant to the statutes of the State of Illinois. It might also be desirable to add a sentence stating that the 3% addition will be made in all cases except where bidders submit proof that they are subject to the payment of the occupational tax.

Your third question is whether your department would be obligated to determine the correctness of the claim of the bidder that the sale will or will not be subject to the Illinois Retail Dealers' Occupational Tax. We do not believe you would be called upon to make an independent investigation in order to determine the correctness of the claim, but think you could rely upon the evidence submitted to you with the proposals as being *prima facie* correct. In order to protect your department, our thought would be for you to add the 3% amount to all bids received by you which were not accompanied by competent evidence that the bidder was liable for the retailers' occupational tax. The practical effect would be to require all bidders to submit with their proposals evidence of whether they were or were not subject to payment of the Illinois Occupational Tax.

NOTICE OF MATERIAL CHANGE IN SPECIFICATIONS

(No. 9974—Commissioner of Public Works—J. F. G.—April 5, 1939
—3 pp.)

No material change in the specifications of a contract should be made during the progress of advertising for bids without giving public

notice of such change. Personal notice of a material change in specifications sent to all prospective bidders would not constitute the required public notice so that the contract may be let to the lowest bidder after advertising and such notice. The City Council may, by ordinance passed by two-thirds of the aldermen elected, authorize a particular contract to be let to the lowest responsible bidder without further advertising.

Citations:

Statute: Cities and Villages act, art. IX, sec. 50.

Cases: Flinn v. Philadelphia, 258 Pa. 355 (1917).

Page v. King, 285 Pa. 153 (1926).

Goshert v. Seattle, 107 Pac. 860 (1910).

CHANGE IN SPECIFICATIONS DURING ADVERTISEMENT PERIOD

(No. 10163—*Commissioner of Public Works—M. H. F.—December 20, 1939—2½ pp.*)

When certain contract specifications were amended during the period of advertisement and the lowest bidder notifies the Commissioner of Public Works one day after bids were opened that a change in the bid was necessary because of the change in specifications, the Commissioner should exercise his right to reject all bids since the determination of the identity of the lowest bidder is in doubt.

Citation: Mun. Code: 26-14.

BID VARYING FROM FORMAL SPECIFICATIONS

(No. 9940—*Commissioner of Public Works—J. F. G.—January 4, 1939—3 pp.*)

The City should not accept the bid of an oil company for a supply of gasoline where the formal specifications inviting bids provide that all taxes, assessments, excises or impositions levied and imposed on the product after delivery to the carrier are to be borne by the City and where the company in question has added to the terms of these specifications the proposal that the City shall pay any tax, assessment, excise or imposition levied or imposed on the manufacture, storage, sale, transportation and delivery of the product before it is handed over to the carrier and title passes to the City.

Bids must be submitted substantially on the basis of public invitation for bids. The contract in question should be awarded to the lowest bidder who has complied with the formal specifications or, if proper reservation was made in the advertisement, all bids may be rejected and the invitation for bids readvertised.

ALTERATION OF BIDS AFTER BEING OPENED

(No. 9966—*Regional Director, Federal Emergency Administration of Public Works—W. V. S.—March 17, 1939—5 pp.*)

The Board of Local Improvements properly rejected all bids, which right had been reserved under the advertisement for bids, when the lowest bidder on an improvement contract notified the board after the bids had been opened, that it had erroneously omitted a charge in its sealed bid as submitted.

The practice of permitting alteration of bids in any material respect after they have been opened has been vigorously condemned by the courts.

Citations: *Chicago v. Mohr*, 216 Ill. 320, 328 (1905).
Moffett, Hodgkins & Clarke Co. v. Rochester, 178 US 373, 385 (1900).

PUBLICATION OF ADVERTISEMENTS FOR CONTRACT BIDS IN THE TIMES

(No. 9756—*Commissioner of Public Works—J. F. G.—January 14, 1938—1 p.*)

The Times, which is the City's official newspaper, although it does not publish its paper as of Saturday, does print and place on sale on Saturday its Sunday issue. Under these circumstances, advertising for bids on contracts in ten consecutive publications of *The Times* will meet the ordinance requirement that advertising for bids on contracts be for at least ten consecutive business days.

Citation: Code '31: 222.

RETAILERS' OCCUPATION TAX AFFECTING LOW BIDS

(No. 10089—*Commissioner of Public Works—M. H. F.—August 29, 1939—3 pp.*)

Contracts may be awarded to the low bidders regardless of whether the bidders stated that they were or were not subject to the Illinois retailers' occupation tax, because even if the tax were added, these bidders would still be the low bidders.

Citation: "Act in relation to purchase of materials, products, supplies and provisions for certain institutions in this State," approved June 14, 1937.

ACCEPTANCE OF CONTRACT OFFER

(No. 10106—Commissioner of Public Works—M. H. F.—September 27, 1939—7 pp.)

An ordinance passed by the City Council authorizing the Commissioner of Public Works to consummate a contract by placing a subsequent order does not constitute an acceptance of a bid so as to amount to a valid contract.

Citations:

Statute: IRS '37, 24: 129.

Ordinances: Code '31: 222 to 226.

Coun. J. (1939-40), p. 480, secs. 1-3.

Cases: City of Baltimore v. City of New Orleans, 45 La. Ann. 526 (1893).

West Chicago Park Commissioners v. Carmody, 139 Ill. App. 635 (1908).

Other references: McQuillin, Municipal Corporations (2nd ed.), v. 3, sec. 1267.

19 RCL sec. 348.

OPINION OF FOREGOING SYNOPSIS

Your communication of September 21, 1939 states that on June 23, 1939 the Bureau of Central Purchasing requested bids on two-way radios and you set forth a list of seventeen concerns notified in an effort to obtain quotations. You further state that only one bid was received, that from Doolittle and Falknor, Inc.; that the bureau recommended the award to this corporation and that the City Council authorized you to place an order for the radios with Doolittle and Falknor, Inc. at their quoted price. Subsequently, it is said that a protest was made against the award because the Radio Corporation of America and the Western Electric Company had not been asked to submit prices. Being now desirous of obtaining more competition, if possible, you are directing the superintendent of the Bureau of Central Purchasing to readvertise in order to obviate any charges that your department did not seek wide competition. It being claimed by the attorney representing Doolittle and Falknor, Inc. that the submission of the Doolittle and Falknor, Inc. bid, its transmission to the City Council, and the ordinance passed by the council authorizing you to place an order for the radios with the bidder at its quoted price constitute a contract, our opinion is requested on the questions whether (1) the procedure in readvertising is legal, or (2) whether the contention of the attorney for Doolittle and Falknor, Inc. is correct, that a contract has been consummated between the City and Doolittle and Falknor, Inc.

No legal objection is seen to your soliciting further bids although if the transaction above recited has ripened into a contract it would be obviously improper to award a second contract to some other bidder in order to purchase the desired radios. The crux of the matter, therefore, is whether there now exists a contract between the City and Doolittle and Falknor, Inc. The ordinance passed by the City Council was first submitted to the Committee on Finance in connection with a report of the Bureau of Central Purchasing recommending its passage. The ordinance was passed by a vote of 45 yeas to no nays on June 27, 1939 (Coun. J. p. 480) and reads as follows:

"Be it Ordained by the City Council of the City of Chicago:

"Section 1. That the Commissioner of Public Works be and he is hereby authorized, in accordance with the request of the Superintendent

of the Bureau of Central Purchasing dated June 26, 1939, hereto attached, to place an order for 200 complete transmitting units as specified in Department of Police requisition PD-11871, with the only bidder, Doolittle and Falknor, Inc., at their quoted price of \$60,000.00 for the lot.

"Section 2. The City Comptroller and the City Treasurer are authorized to pass for payment voucher covering this purchase, when properly approved by the Commissioner of Police.

"Section 3. This ordinance shall be in full force and effect from and after its passage."

It does not appear that the ordinance was vetoed by the Mayor or that it has been reconsidered or repealed.

It is essential to the making of a contract that there be an offer and acceptance. The offer element obviously is present in the instant case. The only question appears to be whether there has been an acceptance. Is the ordinance passed June 27, 1939 an acceptance of the Doolittle and Falknor, Inc. offer or merely authority to the Commissioner of Public Works to accept the offer and thereby consummate a contract? Its terms clearly indicate to us that it does not constitute in itself an acceptance, but is only the action of the council authorizing the making of a contract. Furthermore, the primary purpose of the ordinance seems to be that of complying with the State statute and provisions of the City Code with reference to the making of contracts when the expense thereof exceeds \$500.00. To comply with such statute and code provisions, it was of course necessary to secure council authority, by a vote of two-thirds of all the aldermen elected, in order to obviate the necessity of advertising and letting to the lowest responsible bidder. (Par. 129, chap. 24, Ill. Revised Stats. 1937, sections 222 to 226, inclusive, Revised Chicago Code, 1931.) That the ordinance did not constitute an acceptance, but merely authorized the Commissioner of Public Works to accept the offer by placing an order for the radios is borne out by the adjudicated cases. In *City of Baltimore v. City of New Orleans*, 45 La. Ann. 526, 12 So. 878 (1893), the Supreme Court of Louisiana held that a resolution adopted by the council of a municipal corporation, authorizing and directing its Mayor to enter into a contract with a third person, when not acted on by the Mayor, and when no contract is made, does not of itself create a contract. The court in its opinion said:

"It is nothing more than a power of attorney to the mayor to enter into a contract; and as he did not act under the power, and no steps were ever taken to compel him to do so, the contract was never made, and does not exist."

In *McQuillin on Municipal Corporation*, 2nd ed., vol. 3, sec. 1267, it is said:

"A proposition or offer made to the proper corporate authorities and an acceptance of the terms thereof by an ordinance constitutes a contract. The ordinance accepting the terms of the proposition constitutes assent to the contract on the part of the corporation, as distinguished from a mere declaration of intention to enter into a contract. So an ordinance granting a right, accepted and acted upon by the grantee, becomes an irrevocable contract. But an ordinance authorizing the mayor to enter into a contract does not of itself create a contract, if not acted upon by him."

In 19 Ruling Case Law, sec. 348, in discussing the possibility for a contract binding a municipal corporation to be brought into existence by an ordinance or resolution of the municipal council, it is said:

"Care should be taken, however, to distinguish between the vote of a municipal council consisting in and of itself an offer or acceptance,

and a vote authorizing the executive officers to enter into a contract. In the latter case the municipality will not be bound until the executive officers have acted."

Should it be contended that the ordinance of June 27, 1939 completes a contract, because of the statutory authority given the city to enter into contracts without advertising by a vote of two-thirds of all the aldermen elected, our conclusion is that the statute does not support such contention. The proviso contained in paragraph 129 of chapter 24, Illinois Revised Statutes, 1937, which paragraph provides for the letting of contracts to the lowest responsible bidders in manner prescribed by ordinance when the expense shall exceed \$500, reads as follows:

"Provided, however, any such contract may be entered into by the proper officers without advertising for bids, by a vote of two-thirds of all the aldermen or trustees elected."

It seems clear to us that when the legislature used the words "any such contract may be entered into by the proper officers without advertising for bids" it intended that contracts would be entered into by the proper municipal officers and that the vote of two-thirds of all the aldermen elected was to furnish the authority for the action of the officers. Any other construction would render meaningless the words "by the proper officers" contained in the statute.

We, therefore, see no escape from the legal conclusion hereinabove stated. The authorities cited by counsel for Doolittle and Falknor, Inc., are not helpful. The only one in point, that of *West Chicago Park Commissioners v. Carmody*, 139 Ill. App. 635, holds that the acceptance by the park commissioners of a definite bid for work made pursuant to advertisement, constitutes a contract. It does not convince us that the ordinance of June 27, 1939 was an acceptance of the Doolittle and Falknor, Inc. bid and thereby consummated a contract between the city and that corporation.

The granting of authority to a municipal official to make a contract is not the equivalent of and not the making of a contract. Basing our conclusion upon the facts presented to us, our opinion is that a contract has not yet been made between the parties involved in this inquiry. The city will not be under contract unless and until the Commissioner of Public Works places an order in furtherance of the authority conferred upon him. While contracts may be made by ordinance, the ordinance passed by the City Council of the City of Chicago June 27, 1939, did not make a contract; it merely authorized you as Commissioner of Public Works to consummate a valid contract by placing a subsequent order.

The file transmitted with your communication is returned herewith.

AWARDING OF PUBLIC WORK CONTRACTS

(No. 9932—*Commissioner of Public Works—J. F. G.—December 14, 1938—2½ pp.*)

When work is to be done or public improvements constructed by day labor to be employed by the City, such work must be specifically authorized by an ordinance passed by a vote of two-thirds of all the aldermen elected. All materials for such work of the value of \$500 and upward must be purchased by contract let to the lowest responsible bidder in the manner prescribed by general ordinance.

All contracts for work, materials or supplies relating to any matter

under the cognizance of the Department of Public Works and exceeding \$500 in amount shall be let by the Commissioner of Public Works. However, no such contract shall be binding until duly executed by the Commissioner of Public Works, countersigned by the Comptroller and approved by the Mayor. Nor shall any such contract in excess of \$500 be entered into during the last month of the fiscal year except by special order of the City Council.

Citations:

Statute: IRS '37, 24: 129 Cities and Villages act.

Ordinances: Code '31: 224, 225, 660.

BOARD OF LOCAL IMPROVEMENTS CONTRACT NOT PAID BY SPECIAL ASSESSMENT

(No. 9741—City Comptroller—J. F. G.—January 3, 1938—2½ pp.)

In entering into a contract for an improvement which is not paid wholly or in part by special assessment and acting in lieu of the Commissioner of Public Works, the Board of Local Improvements is not governed by the Local Improvements act but must abide by those sections of the City code applicable to contracts entered into by the Commissioner of Public Works. All such contracts which exceed \$500 in amount must be approved by the Mayor, be countersigned by the Comptroller, and contain provision for a reserve of 15% of the value of the work completed from time to time as the work progresses.

Where advertisement for bids was published, bids accepted and the contract executed with specifications requiring only a 10% reserve instead of a 15% reserve, the 10% reserve governs because the work progressed and was accepted pursuant to the contract. After the contract was entered into, however, the Board of Local Improvements had no authority to reduce the amount required as a reserve from 10% to 2%.

Citations:

Statute: Local Improvements act, sec. 91.

Ordinances: Code '31: 90, 227.

Coun. J. (1937-38), p. 4120.

B. EXECUTION AND INTERPRETATION

RACE DISCRIMINATION CLAUSES IN CITY CONTRACTS

(No. 9892—Commissioner of Public Works—W. V. S.—September 28, 1938—6 pp.)

A clause prohibiting discrimination on account of race, color, or creed in the employment of workmen on City construction projects

may properly be included in City contracts, but a clause requiring that a designated percentage of all workmen employed upon such projects be members of a certain class of citizens, violates rights secured by the fourteenth amendment to the Federal Constitution and may not be included in City contracts.

Citations: *People v. Crane*, 214 NY 154, 239 US 195, 60 L. ed. 218 (1915).
Heim v. McCall, 214 NY 629, 239 US 175, 60 L. ed. 206 (1915).
Lee v. City of Lynn, 223 Mass. 709, 111 NE 700 (1916).
Fiske v. People, 188 Ill. 206 (1900).
Holden v. City of Alton, 179 Ill. 318 (1899).
Adams v. Brennan, 177 Ill. 194 (1898).

OPINION OF FOREGOING SYNOPSIS

Recently you transmitted to us a copy of a letter from an organization of Negro building mechanics called the Brotherhood Club, addressed to the Mayor. This letter suggested that two clauses be included in all City contracts for construction work, the first prohibiting discrimination in the hiring of workmen on account of race, color or creed, and the second requiring that a designated small percentage of all workmen employed in such work be Negroes. You requested our opinion as to the legality of including these clauses in the City's contracts for construction work.

So far as the first clause is concerned, we have no doubt that it may properly be included in City contracts. We are aware of no statute which would be violated by the inclusion of such a clause. Nor does a provision against discrimination on account of race, color or creed violate any constitutional prohibitions; on the contrary, it furthers constitutional objectives. No discrimination on account of race, color or creed should be permitted in employment upon public construction work, and if an express provision against discrimination is necessary, it should be incorporated in contracts for such work.

The second clause, however, stands upon a different footing. There is a surface similarity between the two clauses which unless analyzed might be deceptive. Both appear to be designed to prevent discrimination in the hiring of workmen; actually, however, the two clauses are mutually inconsistent. The requirement that a fixed percentage of negro workmen be employed upon all City construction work as contemplated by the second clause is itself a "discrimination on account of race, color or creed" of the type which would be prohibited by the first clause. In principle such a clause is not different from one requiring that a designated percentage, large or small, of all workmen be registered Republicans, or Democrats, or be members of a specified religious organization. No logical difference exists between a requirement that five per cent of employees be negroes, for example, and a requirement that ninety-five per cent of employees be white, or be members of a particular national or racial group.

It is true that a state has broad powers to determine the conditions which will govern the performance of work for it or for its municipalities. It may, for example, prohibit the employment of aliens upon public works, and it may require that its own citizens be preferred in employment upon such work above the citizens of other states. [*People v. Crane*, 214 N. Y. 154, 239 U. S. 195, 60 Law ed. 218 (1915); *Heim v. McCall*, 214 N. Y. 629, 239 U. S. 175, 60 Law ed. 206 (1915).] Because the construction of public works involves the expenditure of public moneys, the state may, to better the condition of its own citizens and to prevent pauperism among them, declare that the moneys of the state shall go to the people of the state (*People v. Crane*, *supra*).

But we are aware of no decision which permits discrimination between one class of citizens and another in employment upon the public works. The reasoning which permits discrimination between citizens and aliens is not applicable to cases of discrimination between different classes of citizens of the state. Mr. Justice Cardozo made this clear in his opinion in the *Crane* case when he said:

"In thus holding that the power exists to exclude aliens from employment on the public works, we do not, however, commit ourselves to the view that the power exists to make arbitrary distinctions between citizens. We do not hold that the government may create a privileged caste among the members of the state. *Smith v. Texas*, 233 U. S. 630, 638, 58 L. ed. 1129, 1133, L. R. A. 1915D, 677, 34 Sup. Ct. Rep. 681, Ann. Cas. 1915D, 420. We do not hold that it may discriminate among its citizens on the ground of faith or color. *Strauder v. West Virginia*, 100 U. S. 303, 25 L. ed. 664, 3 Am. Crim. Rep. 515; *Gibson v. Mississippi*, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904; *Rogers v. Alabama*, 192 U. S. 226, 231, 48 L. ed. 417, 419, 24 Sup. Ct. Rep. 257. A citizen may not be disqualified because of faith or color from service as a juror. *Strauder v. West Virginia*, *supra*. For like reasons we assume that he may not be disqualified, because of faith or color from serving the state in public office or employment. It is true that the individual, though a citizen, has no legal right in any particular instance to be selected as contractor by the government. It does not follow, however, that he may be declared disqualified from service, unless the proscription bears some relation to the advancement of the public welfare. * * *

A similar view as to discrimination between citizens was expressed by Chief Justice Rugg in a case involving the validity of a Massachusetts statute which required that preference in employment in the construction of public works be given to citizens of the commonwealth. He said:

* * * "In its representative capacity within appropriate functions of legislation, the general court stands in the position of employer. It may establish general rules for the employment of labor. *Since it is a public agency directing the expenditure of money raised by taxation, it cannot make arbitrary discrimination and favor the employment of one class of citizens to the exclusion of others.* But a preference of citizens over aliens in the public service is not favoritism among the subjects of the commonwealth. Aliens are not members of the state in the strict sense. Statutory discriminations in favor of citizens and against aliens have been upheld." * * * [*Lee v. City of Lynn*, 223 Mass. 709, 111 N. E. 700 (1916).] Italics ours.

It has been decided in several Illinois cases that a discrimination between different classes of citizens in employment upon public works is invalid. In *Fiske v. The People*, 188 Ill. 206 (1900), the court in discussing an ordinance of the City of Chicago requiring the employment of members of labor unions in the performance of public work said, p. 208:

"Undoubtedly, the ordinance of October 17, 1898, is unconstitutional and void. The requirement, that the bidder for doing the work on a public improvement shall agree to hire only members of labor unions in the performance of such work, and that, in all contracts executed by the commissioner of public works on behalf of the city, the contractor shall agree to hire only members of labor unions, amounts to a discrimination between different classes of citizens, and lays down a rule, which restricts competition and increases the cost of work." * * *

To the same effect is *Holden v. City of Alton*, 179 Ill. 318 (1899).

The cases which have been thus far discussed involved the validity of statutes or ordinances, but the principles applicable to discriminatory statutes and ordinances are equally applicable to discriminations made effective

in contracts without specific legislative authority. In *Adams v. Brennan*, 177 Ill. 194 (1898), it was argued that a different rule was applicable to a contract requiring the employment of union labor than would have been applicable to a similar statutory requirement. Answering this contention the court said, pp. 200, 201:

"There seems, however, to be a claim that the board of education, although it could not be lawfully required or authorized to make such a contract, may have some sort of discretion to do so, and the only question in the case on the subject of the validity of such contract, is whether the board possesses power beyond that of the legislature, in which is vested the entire legislative authority of the State. Upon what theory it could be claimed that this board of education, which exercises merely the function of the State in maintaining public schools within a limited portion of the State, can possess either power or discretion which the State in its sovereign capacity could not confer upon it we are unable to imagine. No argument is made which would justify such a conclusion. There can be no greater power of the board to act of its own motion than by virtue of positive law. The results, in either case, are equally in conflict with the organic law, and such legislation, contract or action, whatever form it may take, is void." * * *

In our opinion, therefore, a clause prohibiting discrimination on account of race, color or creed, in the employment of workmen on City construction projects may properly be included in City contracts, but a clause requiring that a designated percentage of all workmen employed upon such projects be members of a certain class of citizens, violates rights secured by the Fourteenth Amendment to the Federal Constitution, and may not be included in City contracts.

RESERVATION OF PAYMENT ON SUBWAY PRINTING CONTRACT

(No. 9990—Comptroller—J. F. G.—April 25, 1939—2 pp.)

Printing contracts let by the Department of Subways and Traction pursuant to authority of the City Council are not subject to the requirement that a portion of payment be withheld as a reserve, and therefore payment should be made as provided by the contract.

Citations: Code '31: 227, 235.
Coun. J. (1938-39), p. 8138.

ADVANCES ON CONTRACT FOR BOND PREMIUM

(No. 10043—City Comptroller—D. L. L.—June 27, 1939—3 pp.)

When a contract bid includes the cost of the bond premium and the contract provides that 85% of the value of the work done may be paid for as the work progresses, it would amount to a change in the terms of the contract to advance the amount of the bond premium in the first estimate of work completed or by an increase over the 85% to cover that cost. Any variance of the written contract must be done by the City Council, and the Commissioner of Public Works was not authorized by the City Council to alter the provisions of this contract.

PAYMENT TO CONTRACTOR NOT SIGNING RELEASE

(No. 9926—*City Comptroller*—W. V. S.—December 8, 1938—2 pp.)

The City is not justified in withholding payment of the amount admittedly due to the contractor solely because the release form contained in the voucher has not been executed. Where the work called for by the contract has been fully and satisfactorily performed and no defense would be available to an action to secure payment for the amount of the final voucher, a release form in the final voucher releasing the City from all claims and containing a covenant not to sue, may be stricken and a receipt providing for payment in full may be inserted in its place.

Opinion No. 9922 of December 2, 1938, to the Comptroller, holds substantially the same as the above opinion.

AUTHORITY FOR INCREASES UNDER UNIT CONTRACT

(No. 10141—*City Comptroller*—J. F. G.—November 18, 1939—2½ pp.)

Under a contract for construction of a bulkhead authorized by the City Council on a unit basis, no further Council authority is necessary to adjust the quantities of the specific items included in the contract to conform with the needs in the completion of the work so long as the unit prices fixed are maintained and the aggregate amount to be paid under the contract is not exceeded. When the total amount of the contract exceeds the amount authorized by the City Council, Council authority is necessary to pay any amount in excess of the authorized amount.

Citations: Mun. Code: 26-31.

Coun. J. (1938-39), p. 7377.

CONTRACTOR'S CLAIM FOR INCREASED COSTS

(No. 9888—*Commissioner of Public Works*—W. V. S.—September 16, 1938—4½ pp.)

A dredge and dock company which contracted with the City to perform certain work is not entitled to extra compensation because of the increased cost brought about by the date fixed by the City to begin work and the difficulties of working in the winter time, since the City had the right under the contract to fix the date of commencement and since winter work was contemplated by the contract.

Citations: *United States v. Spearin*, 248 US 132 (1918).

Green v. Ashland State Bank, 346 Ill. 174 (1932).

Harley v. Sanitary District, 226 Ill. 213 (1907).

DAMAGE TO WORK UNDER UNCOMPLETED CONTRACT

(No. 10033—*Commissioner of Public Works—J. J. M.—June 14, 1939*
—3 pp.)

Where electrical equipment is installed under a bridge contract which provides that pending completion of the entire job by the City, the contractor shall be responsible against damage from any cause, the City is not liable for damage by fire to electrical equipment prior to final completion of the job.

**SUBSTITUTION OF PERSONAL BOND FOR CORPORATE SURETY
BOND FOR DRIVEWAY**

(No. 9784—*J. F. G.—February 24, 1938—1½ pp.*)

Upon the filing of a personal bond covering a driveway in substitution for the corporate surety bond covering the driveway, the liability of the corporate surety for its bond would be terminated only as to any obligation which arose after the filing of the personal bond. The corporate surety would still be liable to indemnify the City for any breach of the conditions of its bond which occurred prior to the substitution of the personal bond, although the damage on account of such a breach might not be ascertained until some later time.

Citation: Code '31: 857 as amended, Coun. J. (1937-38), p. 5013.

CHAPTER XIV

PUBLIC IMPROVEMENTS

A. CONSTRUCTION

IMPROVEMENT WORK PERFORMED BY CITY EMPLOYEES

(No. 9951—*Regional Director, Federal Emergency Administration of Public Works—W. V. S.—February 1, 1939—2½ pp.*)

The City, when its ordinances so provide, may perform work in connection with improvements directly through its own employees.

Citations: IRS '37, 120: 417 to 434 (Motor Fuel Tax act), 24: 129 (Cities and Villages act, art. IX, sec. 50).

PROPERTY IMPROVEMENT OUTSIDE CITY

(No. 10105—*Board of Local Improvements—C. B. C.—September 25, 1939—2½ pp.*)

The City Council has no authority either to pass an ordinance for the improvement of property outside the City limits or levy a special assessment for such improvement and any special assessment so levied is uncollectible.

Citation: 18 Op. Corp. Coun. 26 (No. 7577).

CONSTRUCTION OF DRIVEWAY AS PART OF IMPROVEMENT

(No. 9994—*Engineer of Special Improvements—W. V. S.—May 3, 1939—5 pp.*)

Where a paving improvement would result in change of grade which might subject the City to suit for damage and render an existing driveway hazardous to traffic, the City may properly and legally construct a driveway as part of the paving improvement to replace the existing driveway.

CONSTRUCTION OF TURN-AROUND

(No. 10010—*Engineer of Special Improvements—D. L. L.—May 18, 1939—3 pp.*)

Where the plan for the construction of a street improvement indicates that a turn-around in an alley is necessary because no exit is provided for several blocks, such turn-around may properly be constructed as part of the improvement as a necessary incident thereto.

CONSTRUCTION OF VIADUCT ON RAILROAD LAND

(No. 10064—*Commissioner of Public Works—W. V. S.—August 2, 1939—2 pp.*)

When certain land necessary for the construction of a viaduct is owned by a railroad company, the City cannot construct such improvement until said property has been acquired either by agreement or by condemnation.

LIABILITY FOR MAINTENANCE AND REPAIR OF SIDEWALKS AND FOR COST

(No. 9836—*President, Board of Local Improvements—A. A. S.—May 31, 1938—6½ pp.*)

Abutting property owners are not liable for the maintenance or repair of sidewalks. The City should make repairs or construct a new sidewalk when the defective condition of a sidewalk has been called to the attention of the proper official. While the City is liable for the repair and maintenance of sidewalks, it has power to assess property for the building of sidewalks.

In isolated cases of badly defective sidewalks, the sidewalks may be rebuilt under the sidewalk act by the City Council passing an ordinance providing for the sidewalk and giving the abutting property owner or owners thirty days in which to construct it in accordance with the ordinance. At the end of thirty days, the City may construct the sidewalk and have the City Clerk tax the cost against the abutting property and issue a warrant to the City Collector to collect the tax.

When a large number of sidewalks are badly in need of repair, the Board of Local Improvements should cause an improvement ordinance for the construction of new sidewalks to be passed by the City Council and levy a special assessment against the abutting property owners to pay the cost of the improvement. Public hearings are not required in any proceeding to build or reconstruct a sidewalk.

Citations:

Statutes: IRS '37, 24: 521-528, 705.

Cases: *City of Bloomington v. Bay*, 42 Ill. 503 (1867).
Hogan v. Chicago, 168 Ill. 551 (1897).
Burns v. Kunz, 290 Ill. App. 278 (1937).
Chicago v. Crosby, 111 Ill. 538 (1884).

OPINION OF FOREGOING SYNOPSIS

We are in receipt of a letter dated April 7, 1938, in which you ask for an opinion relative to whether or not it is the primary responsibility of abutting property owners to maintain their sidewalks in a safe condition or whether the city is bound under the special assessment law to rebuild

sidewalks considered dangerous to pedestrians. On the same date we received a letter from your superintendent of sidewalks with which he enclosed two letters dated February 14th and April 5th respectively, from one Andrew P. Canning, the receiver of buildings located at 4022-08 Milwaukee Avenue and 4946-52 Berteau Avenue, in which letters Mr. Canning made a demand on the city to rehabilitate defective sidewalks in front of the above mentioned buildings. His request being similar to yours, we are incorporating in this opinion the answer to the inquiry of Mr. Callahan, Superintendent of Sidewalks, as presented in his letter.

In regard to the question of the liability of abutting property owners for the maintenance of sidewalks, we wish to call your attention to the law on this question as enunciated by our Supreme Court in the case of *City of Bloomington v. Bay*, reported in 42 Ill. Supreme, 503 (1867) wherein the Supreme Court at pages 507 and 508 said:

"The fact that the city authorities could impose the duty of constructing sidewalks upon the lot owners, cannot relieve them from other liability, in case a sidewalk, no matter by whom constructed, is suffered to be and remain out of repair and dangerous to use * * *. It having been built, by whom is immaterial, and it being a part of the city, it was the duty of the city to keep it in repair, it being under their exclusive control. If it was built by the owner of the lot abutting on it, justice requires it should not be permitted by the city to suffer it to go to decay and ruin, when it was in their power by exercise of a reasonable degree of diligence to have prevented it, and preserved it for the safe passage of all those whose necessities required its use. The duty still remained with the city to keep this sidewalk in a safe condition for use. The exclusive control over the streets being with the city authorities, and sidewalks being a component part of every street, those authorities cannot relieve themselves from their just liability, by casting the burden of constructing sidewalks upon the lot owners; and if they construct the sidewalks by command or order of the city authorities, or without it, the authorities are bound to keep such sidewalks in repair, and the charter nowhere requiring the owner of the lot to perform that duty."

Again, in the case of *Hogan v. City of Chicago*, 168 Ill. Supreme, 551 (1897), the Supreme Court at page 559 said:

"* * * Nor is it material by whom the sidewalk was originally constructed. If it was built by the owner of the lot abutting upon it by order of the city authorities or without such order, such authorities are bound to keep it in repair, and preserve it for the safe passage of all whose necessities require its use."

In the case of *Burns v. Kunz*, 290 Ill. App. 278 (1937), the Appellate Court in re-affirming the law as enunciated by our Supreme Court said as follows:

"It was the duty of the City of Chicago to keep the sidewalk in repair and not that of the Kunz's, the abutting property owners."

We are therefore of the opinion that the abutting property owners are not liable for the maintenance or repair of sidewalks but that the City of Chicago should make repairs or construct a new sidewalk when it has been called to the attention of the proper official in order that the city may avoid any future litigation for damages resulting from injuries caused to some pedestrian by reason of such defect. We believe that this opinion will satisfy the query made by the superintendent of sidewalks in his letter.

Your question as to whether or not under the Local Improvements Act it is mandatory on the City of Chicago to rebuild sidewalks considered

dangerous to pedestrians can be answered in the negative. We are of the opinion that there is no section of the Local Improvements Act making it compulsory on the city to rebuild sidewalks even though notice has been served of its dangerous condition. It would seem to be the policy, however, of the proper city official to take cognizance of such notice and endeavor to repair the sidewalk in order to avoid possible personal injury claims against the city in the future due to injuries arising out of the defective condition of said sidewalk. While as we say it is not mandatory under the Local Improvements Act to make such repairs, we believe that the Board of Local Improvements has ample power under that act to initiate steps for sidewalk improvements and we refer you to Section 705 of Chapter 24 of Illinois Revised Statutes of 1937.

Under this section which is a part of the Local Improvements Act, it is provided among other things as follows:

"Provided, however, that in proceedings only for the laying, building, constructing or renewing of any sidewalk, water service pipe, or house drain, no resolution, public hearing or preliminary proceedings leading up to the same shall be necessary. In such proceedings the board may submit to the city council or board of trustees, as the case may be, an ordinance, together with its recommendation and (when an estimate is required by this act) the estimated cost of the improvement, as made by the engineer, as herein provided, and such proceedings shall have the same force and effect as though a public hearing had been had thereon."

Since it is within your power to cause an improvement ordinance to be passed by the city council for the construction of new sidewalks without the necessity of a public hearing, it seems that your department through your superintendent of sidewalks should make a survey of the sidewalk, particularly along Milwaukee Avenue and Berteau Avenue for the purpose of ascertaining whether or not there are other sections of sidewalk other than the sections fronting on the property managed by Mr. Canning so badly defective that it would be advisable to pass an improvement ordinance for the laying of new sidewalks along the streets mentioned and to levy a special assessment against the property owners abutting thereon to pay the cost of said improvement. We do not deem it advisable to proceed, however, under this section of the Local Improvements Act unless you find a majority of the sidewalks along said streets badly in need of repair. Since the notice has been served upon you through your superintendent of sidewalks of the defective condition of the sidewalks in front of the premises managed by Mr. Canning, it follows that the city would have no defense whatsoever to a personal injury action brought by anyone suffering injury by reason of such defective sidewalks. Since our liability under the circumstances is clear, you should take the necessary steps to avoid such liability. We therefore refer you to the Sidewalk Act for authority to construct a new sidewalk in front of the premises managed by Mr. Canning.

This act was not repealed by the Local Improvements Act but remains in full force and effect. We refer you specifically to Sections 521 to 528, inclusive, of Chapter 24 of Illinois Revised Statutes of 1937 for the proper procedure in construction of the sidewalk by special taxation. We are of the opinion that any sidewalk badly defective can be replaced by a new sidewalk under the Sidewalk Act and the expenses thereof charged to the abutting property owners.

The method for constructing a new sidewalk under the Sidewalk Act is briefly, as follows:—An ordinance is passed providing for the sidewalk desired and the property owner is given 30 days in which to construct it in accordance with the ordinance. At the end of 30 days the city may construct it and the cost is taxed against the lots by the city clerk. This official thereupon issues a warrant to the city collector who proceeds and collects the tax.

The advantage of this method appears to be saving of time and expense by avoidance of all court proceedings. By either method the property owner is compelled to pay, not only the entire expense of constructing a sidewalk but also all of the expense of collecting such cost; any saving in the process of making such collection is a saving to the property owner. A diminution in the time in which a sidewalk is allowed to remain out of repair is a benefit not alone to the public using the street but must be a positive saving to the city of a portion of the money required to meet claims for the damages growing out of defective sidewalks. It seems clear, therefore, that this method of procedure under the Sidewalk Act should be less expensive and more expeditious than the method under the Local Improvement Act.

While the City of Chicago is primarily liable for the repair and maintenance of sidewalks, there can be no doubt in the mind of anyone as to the power of the city to assess property for the building of sidewalks. The power is ample, complete and beyond dispute or denial. The case of *City of Chicago v. Crosby*, 111 Ill. Supreme, 538 (1884), decides only that the city cannot compel property owners to build sidewalks by the process of penal ordinance; that the fee of the streets being in the city, it is for the city to build the sidewalks. This has always been the law in this State. While the city is obliged to build and keep in repair the sidewalks, it can do so at the expense of the property owner by assessing his real estate for the cost of such improvement.

We are therefore of the opinion that any defective sidewalks brought to the attention of the proper officials in the future should be rebuilt in isolated cases under the procedure set out in the Sidewalk Act hereinabove referred to.

COMPROMISING PROSPECTIVE IMPROVEMENT DAMAGES

(No. 10148—*Commissioner of Public Works—J. J. M.—November 27, 1939—2½ pp.*)

The City Council may authorize the execution of an agreement compromising prospective claims for damages resulting from a public improvement when the Council is satisfied that such agreement is advantageous to the City.

REJECTION OF ALL BIDS ON CONSTRUCTION WORK

(No. 9992a—*President, Board of Local Improvements—W. V. S.—May 2, 1939—2 pp.*)

If the bids submitted for the construction of public improvements indicate erratic bidding not warranted by the conditions in the industry, the municipal officers, in the exercise of their discretion, may reject all bids and readvertise.

Citation: IRS '37, 24: 192.

B. SPECIAL ASSESSMENTS

FORECLOSURE OF SPECIAL ASSESSMENT LIEN

(No. 10162—City Comptroller—R. J. N.—December 20, 1939—3½ pp.)

The City's rights to property arising out of unpaid special assessments are unaffected by a tax foreclosure suit when the City was not made a party nor served with summons. An affidavit of unknown owners does not make the City a party so as to foreclose its rights arising out of the delinquent assessments. Therefore, the City's lien may be asserted against the purchaser in the foreclosure sale at any time.

Citation: *Graham v. O'Connor*, 350 Ill. 36 (1932).

SATISFACTION OF SPECIAL ASSESSMENT LIEN

(No. 10151—City Comptroller—E. H.—November 28, 1939—6 pp.)

When claimant agrees to reduce valid claims against the City and to direct that actual cash be obtained from the County Treasurer out of condemnation awards now on deposit, which savings amount to the total of the City's special assessment lien, such savings constitute a full satisfaction of the City's lien and is therefore a valid consideration for executing quitclaim deeds and surrendering the City's certificate of sales to claimant.

INTEREST ON SPECIAL ASSESSMENT BONDS AFTER MATURITY

(No. 10072—City Comptroller—R. J. N.—August 8, 1939—2 pp.)

Special assessment bonds and vouchers bear interest up to the time that sufficient money has been collected to pay the principal and interest and the City is not under any duty to notify the holders of such bonds or vouchers when that amount is available. Thereafter, the bonds and vouchers mature and cease to bear interest.

Citations:

Cases: *Village of Wilmette v. People*, 214 Ill. 107 (1905).

City of Chicago v. Hurford, 283 Ill. 552 (1909).

Other reference: *Op. Corp. Coun.* (1916-1919), p. 783.

LIABILITY ON LONG MATURED SPECIAL ASSESSMENT VOUCHERS

(No. 10165—City Comptroller—W. V. S.—December 27, 1939—2 pp.)

The City is not liable on special assessment vouchers dated June 25, 1901 as more than ten years have elapsed since their maturity and the City's records indicate that all vouchers of the warrant in question have been paid in full.

Citation: IRS '39, 83: 17.

REDUCTION OF INTEREST IN SPECIAL ASSESSMENTS EX- TENDING TIME OF PAYMENT OF ASSESSMENT

*(No. 9788—Chairman, Committee On Special Assessments—A. A. S.
March 1, 1938—2 pp.)*

The City Council may not reduce the amount of interest payable on special assessments without the consent of the bondholders.

It is mandatory upon the City Council to pass an ordinance extending the time of payment of an assessment and providing for the issuance of refunding securities after petition has been presented by seventy-five or more per cent of the holders of securities issued against the assessment.

Citation: Local Improvements act, secs. 86a, 86b.

SPECIAL ASSESSMENT BONDS IN PAYMENT OF ASSESSMENT

(No. 9999—City Comptroller—W. V. S.—May 9, 1939—2 pp.)

Bonds or vouchers issued in anticipation of a special assessment installment may be used for payment of the same special assessment whether current, forfeited, sold to the City or withdrawn from sale, but not when the special assessments have been sold to persons other than the City.

Special assessment bonds should not be accepted in payment of installments of special assessments when the amount of the bond exceeds the amount of the assessment in payment of which it is presented, unless the owner consents to cancellation of the bond.

Citations:

Statutes: Local Improvement act, sec. 89.

IRS '37, 24: 795.

Other reference: House Bills, Nos. 566, 567, 1939 Ill. Legislative Session.

USE OF SPECIAL ASSESSMENT BONDS IN PAYMENT OF ASSESSMENTS

(No. 10061—City Comptroller—W. V. S.—July 25, 1939—7 pp.)

The 1939 amendment to section 89 of the Local Improvement act authorizes the payment of special assessments by special assessment bonds and where the assessment is less than the bond, an endorsement indicating payment to the extent of the assessment may be made upon the bond and the bond returned to the person making payment. However, this amendment might be invalid if made applicable to bonds existing at the time of the amendment and until the statute has been judicially determined, previously issued bonds should not be accepted in payment of special assessments where the bond exceeds the amount of the assessment unless the owner consents to a cancellation of the bond.

Citations:

Statute: IRS '37, 24: 795.

Cases: *People v. Sears*, 344 Ill. 189, 198 (1931).

City of Jacksonville v. Bankers Life Co., 90 Fed. (2d) 141 (1937).

Rothschild v. Village of Calumet Park, 350 Ill. 330 (1932).

Other reference: House Bill, No. 567 (1939), Ill. Legislative Session.

OPINION OF FOREGOING SYNOPSIS

Your letter of July 17, 1939 advised us that House Bill 567 adopted by the 61st General Assembly, has been approved by the Governor. The bill pertains to the application of special assessment bonds (or vouchers) in payment of special assessments. Your letter referred to our opinion of May 9, 1939 concerning this subject and requested advice as to whether or not bonds may now be accepted in payment of special assessments when the amount of the bond exceeds the amount of the assessment, an endorsement indicating the partial payment being made upon the bond and the bond being returned to the person making the payment.

Section 89 of the Local Improvement Act, as it existed prior to its amendment by the adoption of House Bill 567, provided:

"§ 89. Any property owner may pay his assessment, wholly or in part, with the bonds or vouchers issued under this act on account of such assessment, applying, however, the bonds and vouchers of each series only to the payment of the installments to which they relate. In making such payments, such vouchers and bonds shall be taken at their par value and interest accrued to the date of making such payment. All vouchers and bonds received in payment of such assessment shall be cancelled by the officer receiving the same, as of the date of their receipt, and deposited with the treasurer of the said town or village issuing the same." (Ill. Rev. Stat. 1937, Ch. 24, Par. 795.)

On May 9, 1939 we advised you that in our opinion, because of the language of section 89, bonds should not be accepted in payment of installments of special assessments when the amount of the bond exceeds the amount of the assessment in payment of which it is presented, unless the owner consents to cancellation of the bond.

House Bill 567 amends section 89 of the Local Improvement Act by providing that bonds presented in payment of special assessments shall

be cancelled when the amount of the bond equals or is less than the assessment, but that when the amount of the assessment is less than that of the bond an endorsement indicating payment to the extent of the assessment shall be made upon the bond and the bond shall be returned to the person making the payment, or the bond shall be cancelled and a new bond issued for the balance due.

The practical result of the amendment is to make possible the application of special assessment bonds in payment of special assessments in numerous instances where if it was required that the bond tendered in payment of the assessment be cancelled, payment in this manner would not be made.

The substantial questions presented by your request for an opinion are whether or not the amendment may properly be construed to apply to bonds and vouchers issued prior to the adoption of the amendment, and whether the amendment so construed is vulnerable to constitutional attack.

The amendment does not purport to have any retrospective effect. Section 1 of House Bill 567 begins with the following language:

"Section 1. Section 89 of 'An Act concerning Local Improvements, approved June 14, 1897, as amended,' is amended to read as follows:"

Concerning an amendment to the Revenue Act of 1898, in which similar language was employed, the Supreme Court said:

"* * * When a statute is amended 'so as to read as follows,' as in the case of this amendment, the amendment has no retroactive force. The part of the original act which remains unchanged is considered as having continued in force as the law from the time of its original enactment and the new portion as having become the law only at the time of the amendment. (Potter's Dwaris on Stat. Const. 165; *City of Anderson v. O'Donnell*, 29 S. C. 355; *Allison v. Hatton*, 46 Ore. 370; *Matter of Prince*, 136 N. Y. 355.)

[*The People v. Sears*, 344 Ill. 189, 198 (1931).]

Assuming, however, that the amendment may properly be construed to apply to bonds and vouchers outstanding at the time of its adoption a serious question arises as to its validity when so applied. When the owner of property assessed in a proceeding under the Local Improvement Act pays an installment of a special assessment in cash, the money received by the city is allocated pro rata upon all of the bonds and vouchers issued to anticipate the collection of that installment of the assessment. When a bond is used in payment of a special assessment no money is received by the city for distribution among the bondholders. It may therefore be claimed that the rights of bondholders are affected by the amendment, the practical effect of which is, as has been stated, to enlarge the class of cases in which bonds may be used in payment of special assessments.

In *City of Jacksonville v. Bankers Life Co.*, 90 Fed. (2d) 141 (C. C. A. 7, 1937), the Circuit Court of Appeals discussed the applicability of an amendment to section 43 of the Local Improvement Act adopted in 1933, which authorized the issuing municipality to pro rate accumulated special assessment funds on unmatured bonds, to bonds which were issued in 1920 and 1921 at a time when the statute provided for the selection of unmatured bonds for payment by lot. The court said, page 144:

"* * * To apply this act would be to compel appellees and other bondholders, irrespective of their desires, to accept payment and discharge of interest paying obligations, prior to their maturity. Inasmuch as the statute contains no language purporting to give it a retroactive effect, in view of the results that would follow, we hold

that the rights of appellees on unmatured bonds are measured by the act of 1897, under and by virtue of which their statutory remedy is to compel a selection of bonds by lot and application of accumulated assessments thereon; that appellees are holders of unmatured obligations, whose right to recover upon their securities has not yet matured and whose only other remedy under the statute is to compel application upon bonds selected by lot. *Conway v. Chicago*, 237 Ill. 128, 86 N. E. 619. * * *

In *Rothschild v. Village of Calumet Park*, 350 Ill. 330 (1932), it was contended that a purported amendment to Section 43 of the Local Improvement Act, which authorized the selection of special assessment bonds for payment by lot, applied to bonds outstanding at the time of the supposed enactment of the amendment. Concerning this contention the court said, pages 337, 338:

"Statutes are, as a general rule, prospective, only, in their operation, and they will not be construed to have a retrospective operation unless the language used in the statute is so clear that it will admit of no other construction. (*White Sewing Machine Co. v. Harris*, 252 Ill. 361; *Dunne v. County of Rock Island*, 283 id. 628; *O'Brien v. Chicago City Railway Co.*, 305 id. 244.) The bonds in this case were issued in 1920 and 1921. They contained on the face of each bond the statement required by section 86, 'this bond and the interest thereon are payable solely out of' a specified installment of a designated assessment. This was a contract binding on both the village and the bondholder, and even if that which is now relied on by the plaintiff in error as an amendment of section 43 were a valid amendment, it contains no language requiring or justifying a construction that it was intended to apply to these previous valid contracts by authorizing the collections from installments out of which, alone, the defendant in error's bonds were payable, to be distributed among an indefinite number of bonds selected by chance."

It is established that in the application of the proceeds of special assessments to the payment of special assessment bonds the issuing municipality acts as a trustee for the bondholders and that it is generally liable for any breach of its statutory duty as trustee. (*Rothschild v. Village of Calumet Park*, *supra*.)

Enough has been said to indicate that substantial doubts exist as to whether House Bill 567 may properly be construed to apply to bonds and vouchers outstanding at the time of its enactment and whether the bill, if so construed, is valid as against the objection that it impairs the obligation of the contract between the city and the holders of special assessment bonds. Because of these doubts it is our opinion that, until the construction and validity of the statute has been finally judicially determined, you should not accept bonds in payment of special assessments in cases where the bond exceeds the amount of the assessment unless the owner of the bond agrees to its cancellation.

In reaching this conclusion we are not unmindful of the great desirability, in the interest of speedy liquidation of special assessments, of permitting as widespread a use of special assessment bonds in payment of special assessments as is possible. These considerations, however, do not warrant the adoption of a course which may subject the city to future liability.

**PAYMENT OF SPECIAL ASSESSMENTS BY BONDS ON WHICH
JUDGMENTS ARE ENDORSED**

(No. 10111—City Comptroller—W. V. S.—October 4, 1939—2 pp.)

Special assessment bonds, on which judgments against the City have been endorsed, may be used in the payment of special assessments to the same extent and under the same conditions as other bonds may be used. The endorsement of judgments should be disregarded in determining the outstanding amount of such bonds. When presented for payment of assessments, judgments should first have been assigned to the person making payment and satisfaction of judgment obtained by the Comptroller.

PAYMENT OF SPECIAL ASSESSMENTS BY VOUCHER

(No. 10093—City Comptroller—W. V. S.—September 5, 1939—3½ pp.)

Where all the outstanding vouchers issued in anticipation of the collection of each of the special assessment installments are held by a single owner, these vouchers may be used in payment of outstanding special assessments even though the amount of the voucher is larger than the amount of the assessment, when the consent of the owner of all outstanding vouchers is obtained and recorded on each voucher in question.

Citations:

Statute: IRS '37, 24: 795.

Other reference: Op. Corp. Coun. (No. 9999), this volume, p. 306.

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